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CASES

DECIDED IN

THE HOUSE OF LORDS,

ON

APPEAL FROM THE COURTS OF SCOTLAND.

5° & 6° VICTORIÆ,

SESSION OF PARLIAMENT 1843.

VOL. II.

REPORTED BY

SYDNEY S. BELL,

OF THE INNER TEMPLE, BARRISTER AT LAW.

By Appointment of the House of Lords.

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LORD CHANCELLOR,

LORD LYNDHURST.

Appointed September, 1841.

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Appointed September, 1841.

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Appointed September, 1841.

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Appointed October, 1842.

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ADAM ANDERSON, ESQ.

Appointed October, 1842.

CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND.

1843.

[Heard 20*th February*. — Judgment 6*th March*, 1843.]

The HOUSEHILL COAL and IRON COMPANY, *Appellants*.

JAMES BEAUMONT NEILSON, and OTHERS, *Respondents*.

Patent. — User of the subject of an invention, though discontinued for many years prior to the date of a patent for the invention, will invalidate the patent.

Process. — *Proof*. — Where particular instances of user of the subject of an invention were averred, "in particular, among others," held that the proof must be confined to the instances particularly averred.

Process. — *Jury Trial*. — If, on the hearing of Exceptions, the Court is satisfied that there was a misdirection, and that the jury may have been misled by it, the Court has no discretion on a view of the verdict compared with the evidence, but must allow the Exception.

THE respondents were proprietors of a patent for an invention, which consisted in the heating of air in a vessel between the bellows used for blasting furnaces, and the mouth of the furnace, in order to produce more intense heat.

HOUSEHILL Co. *v.* NEILSON. — 6th March, 1843.

In the autumn of 1840, the respondents complained against the appellants, by bill of suspension and interdict, that they were using the respondents' invention, and they at the same time brought an action against the appellants for payment of such damage as they might be able to establish had been incurred by such user. The note of suspension was passed, but interdict was refused, the appellants finding security to pay the damage that might be proved, and thereafter the suspension and interdict, and the action of damages, were conjoined.

In the course of preparing the record in the conjoined actions, the appellants averred, that the respondents' patent was void and ineffectual; among other reasons, — "3*d*, Because the intro- "duction and application of heated air into fires, forges, and "furnaces, to produce a more intense heat and combustion for "various purposes, was known and publicly practised prior to "the date of Mr Neilson's patent. More particularly, heated "air was introduced into the process of creating combustion, "and consuming smoke, by the invention of Mr George Chap- "man of Whitby, in 1825, as well as in other processes.

"4*th*, Because the application of atmospheric air, heated be- "yond its ordinary temperature, to promote combustion in "smelting-furnaces, fires, or forges, or in the smelting of ores "and metals, which, without any limitation, is the invention "now claimed by Mr Neilson as his, was known and practised "prior to the date of his patent, both in England and Scotland. "In particular, it was, among others, practised by the late Mr "Dawson of the Low Moor Iron Works in Yorkshire, by Mr "Wilkinson, of the Bradley Iron Works in Staffordshire, and "also at the Horseley Iron Works in that county. See also "Nicholson's Journal of Natural Philosophy, Chemistry, and "the Arts, for April, 1798, in which there is published a "Treatise by Mr James Sadler, chemist to the Admiralty, "entitled, 'Description of an Apparatus for disengaging Oxygen

" 'Gas, and applying it to the best advantage; to which are " 'added, Observations on the Blowpipe by William Nicholson.' " Also the patent obtained by the Reverend Robert Stirling, " one of the ministers of Kilmarnock, in December, 1816, for his " invention 'for diminishing the consumption of fuel,' &c., and " relative specifications; and the patent obtained on 6th May, " 1828, by Mr Botfield of Hopton Court, in the county of " Salop, for his invention 'for certain improvements in making " 'of iron, or in the method or methods of smelting or making " 'of iron,' and relative specification. Farther, in 1825, or " about that time, Mr Jeffries, of the Grove Foundry, South- " wark, invented a mode or modes of applying heated air in its " transit in pipes, (two or more,) placed in a charcoal fire, for " the purpose of producing a more intense degree of heat in the " smelting of iron-ores or other minerals, and he practised, and " has continued to practise his said invention, and improvements " thereon, either by himself or the company carrying on busi- " ness at the Grove Foundry in Southwark, of which he was a " partner."

After the record had been adjusted the cause was sent to trial by jury upon the following issues, — " Whether, in the course " of the year 1840, and during the currency of the said letters- " patent, the defenders did, in or at their iron-works at House- " hill, by themselves, or others, wrongfully, and in contravention " of the privileges conferred by the said letters-patent, use " machinery or apparatus substantially the same with the " machinery or apparatus described in said specification, and to " the effect set forth in the said letters-patent and specifica- " tion, to the loss, injury, and damage of the pursuers? Or,

" 1. Whether the invention, as described in the said letters- " patent and specification, is not the original invention of the " pursuer, the said James Beaumont Neilson?

" 2. Whether the description contained in the said specifica-

" tion, is not such as to enable workmen of ordinary skill to " make machinery or apparatus capable of producing the effect " set forth in the said letters-patent and specification ?

" 3. Whether machinery or apparatus, constructed according " to the description in the said letters-patent and specification, " is not practically useful for the purposes set forth in the said " letters-patent ?"

After the record and the issues had been adjusted, but before the record was closed, the appellants lodged a Note of Objections, in anticipation of any objection that might be raised upon the 5th section of the 5 and 6 Will. IV. c. 83, which is expressed in these terms: — " And be it enacted, That in any action brought " against any person for infringing any letters-patent, the de- " fendant, on pleading thereto, shall give to the plaintiff, and in " any *scire facias* to repeal such letters-patent, the plaintiff shall " file with his declaration, a notice of any objections on which " he means to rely at the trial of such action; and no objection " shall be allowed to be made in behalf of such defendant or " plaintiff respectively at such trial, unless he prove the objec- " tions stated in such notice: Provided always, that it shall and " may be lawful for any judge at chambers, on summons served " by such defendant or plaintiff, on such plaintiff or defendant " respectively, to shew cause why he should not be allowed to " offer other objections, whereof notice shall not have been given " as aforesaid, to give leave to offer such objections, on such " terms as to such judge shall seem fit." In this note the appellants stated, that the invention of the respondents had been publicly used, both in England and Scotland, before the granting of the letters-patent; and " in particular, the application of " atmospheric air beyond the ordinary degree of temperature " was known and publicly practised before the date of the said " letters-patent at Irvine, Greenock, Glasgow, and at various " other places in the counties of Ayr, Renfrew, and Lanark."

HOUSEHILL Co. v. NEILSON. — 6th March, 1843.

The jury returned a verdict for the respondents on all the issues. The case then came before the Court upon a motion for new trial, and upon thirteen exceptions taken by the appellants to the rejection of evidence, and the charge of the Judge, (the *Lord Justice Clerk.*)

The motion for a new trial was refused, because it was not insisted in, and the whole exceptions were disallowed, after argument.

The appeal was against an interlocutor, (20th July, 1842,) disallowing the exceptions.

At the hearing of the appeal only two of the thirteen exceptions were maintained, namely, the first and eleventh. The first regarded the rejection of evidence; the eleventh was to the charge of the Judge.

The first exception arose under these circumstances, — the appellants tendered a witness to prove use in Irvine, about twenty years previously, at an anchor smith's forge, of a pipe heated between handbellows and the forge, for the purpose of producing more intense heat in the forge. The respondents objected to the evidence, and the Judge sustained the objection by a deliverance in these terms, — "1. That a paper of objec- "tions, lodged in process, with notice thereof before the record "was closed, cannot supply defects in the averments in the "record, on which parties agreed to close the record, in terms "of the statute, supposing that in such paper of objections there "had been any such averment, as in this case would be neces- "sary in the record; 2. On the ground that no proper notice is "given on the record of the proposed line of inquiry generally, "and no notice whatever of prior use of the invention at a "smith's at Irvine, by the application of hot-blast to a smith's "fire; and, 3. On the ground, that in an inquiry as to the "anticipation and prior use of an invention, by instances of the

" practices of individuals, going back to twenty years, it is essen-
" tially necessary for the interests of the patentees, and ends of
" justice, that the record should contain such information as
" shall enable the patentee to be able to meet by inquiry these
" cases, and to investigate the character, purposes, and objects
" of the practices to be proved against him, in which the prior
" use of his discovery and invention is said to be found.

" Same objection held to apply to any other evidence of
" same character." The first exception was to this delive-
rance.

The 11th exception arose thus: In the course of the evidence the appellants proved, that forty years before, the proprietor of smelting works at Bradley, in England, had interposed and heated a cylinder between the furnace and the bellows, which had made the iron run " like milk;" but that as the iron would not do for malleable iron, because it was " so gray or rich," though it might have done for small castings, the proprietors had discontinued the use of the cylinder after an experience of six months.

The charge which related to this, and which gave rise to the 11th exception, was in these terms, — " The next direction I
" have to give you relates to the counter-issues. I must give
" you two directions in point of law on this issue, —

" 1. It is not sufficient to shew that others, in experiments or
" incidental trials, had hit upon the same idea, not having made
" public the principle and the application of it to the same pro-
" cesses.

" Even if the principle had been a known principle, still, if it
" is for the first time applied by mechanical contrivance and
" apparatus to certain processes in which it had not been pre-
" viously used as an agent, the patent would be good; and still
" more when the principle and the mode of carrying it into a
" practical beneficial result are claimed. I have to repeat, that

" the originality of the invention is not destroyed by proof that, " in the history of the arts and trades of this country, some " one or two, or even more persons, may have apparently had " some glimpse of the same conception in occasional and insu- " lated experiments, which were not prosecuted nor made " known, and from which, so far as the rest of the world were " concerned, no result or change followed on former practice.

" The second direction in point of law which I have to give " you on this issue, respects what is prior use, so as to destroy " the invention.

" Now, this is well expressed in the words of the patent in " this and other cases. This is what the defender must prove " — that it was not new, in respect of the public use and " exercise thereof in this kingdom. These emphatic and plain " words hardly require explanation — they convey the meaning " to you in a way that it is impossible to mistake; the question " in each case is a matter of fact for the Jury, but this is, in " point of law, the sort and kind of use, the existence of which " a Jury must find to be proved, in order to warrant them to " find against the patentee. I may state to you that great uti- " lity is one important element in the question of novelty. For " if the process is of great, manifest, striking, and immediate " utility, that is of the utmost importance to the point. — Could " this have been previously in public use and exercise, without " clear and abundant proof? The cases referred to at the bar " have settled that the use must be public use; that the existence " and trial of regular machines of the very same sort, if aban- " doned, if not used and introduced into practice, is not public " use and exercise thereof in the kingdom.

" Again, in the case of the suspension principle for wheels, it " was well stated by Mr Justice Pattison to the Jury who tried " that case, — ' If, on the whole of this evidence, either on the " ' one side or the other, it appeared that this wheel, constructed

" ' by Mr Strutt's order in 1814, was a wheel on the same
" ' principles, and in substance the same wheel, as the other for
" ' which the plaintiff has taken out his patent, and that it was
" ' used openly and in public, so that every body might see it,
" ' and had continued to use the same thing up to the time of
" ' taking out the patent, undoubtedly then that would be a
" ' ground to say that the plaintiff's invention is not new, and
" ' if it is not new, of course his patent is bad, and he cannot
" ' recover in this action; but if, on the other hand, you are of
" ' opinion that Mr Strutt's is an experiment, and that he found
" ' it did not answer, and ceased to use it altogether, and aban-
" ' doned it as useless, and nobody else followed it up, and that
" ' the plaintiff's invention, which came afterwards, was his own
" ' invention, and remedied the defect, (if I may so say,)
" ' although he knew nothing of Mr Strutt's wheel, he remedied
" ' the defects of Mr Strutt's wheel, then there is no reason for
" ' saying the plaintiff's patent is not good.' Again, I close
" what I have to say to you here, by the well considered lan-
" guage of Chief Justice Tindal, whose opinion I am always
" glad to quote, as he unites the character of the accomplished
" scholar with the most profound knowledge of law. ' It will be
" ' for the Jury to say whether the invention was or was not in
" ' public use and operation at the time the patent was granted.
" ' There are certain limits to this question. A man may make
" ' experiments in his own closet; and if he never communicates
" ' these experiments to the world, and lays them by, and ano-
" ' ther person has made the same experiments, and being
" ' satisfied, takes a patent, it would be no answer to say that
" ' another person had made the same experiments. There
" ' may be several rivals starting at the same time; the first
" ' who comes and takes a patent, it not being generally known
" ' to the public — that man has a right to clothe himself with
" ' the authority of the patent, and enjoys the benefit of it, if

" ' the evidence, when properly considered, classes itself under " ' the description of experiment only, that would be no answer. " ' On the other hand, the use of an article might be so general " ' as to be almost universal; then you can hardly suppose any- " ' body would take a patent. Between these two limits most " ' cases will arrange themselves, and it must be for the Jury to " ' say whether the evidence convinces their understanding, that " ' the subject of the patent was in public use and operation at " ' the time when the patent was granted.'

" You will observe that it is settled, that the trials founded on " as proofs of prior use, —

" 1. Must have been public.

" 2. Must have been continued, not abandoned.

" 3. Must have continued to the time when the patent was " granted, — I don't say to the very exact period, but it must " have been known and used as a useful thing at the time.

" The abandonment of trials, as not successful or satisfactory, " is a decided proof that the invention was not turned to account " for public utility, and was not in public use and operation."

The appellants excepted to this charge, " In so far as the " said Lord Justice Clerk directed the Jury, in point of law, that " the proof of prior use of the patent invention must not only be

" (1.) Public, but

" (2.) Must have been continued, not abandoned; and

" (3.) Must have continued to the time when the patent was " granted, — not to the very exact period, but that it must have " been known and used as a useful thing at the time."

The Attorney-General, the Lord Advocate, and Mr Kelly, for the appellants. — Ist Exception. The ground upon which the evidence, to which this exception applies, was rejected, was, that sufficient notice had not been given to the respondents upon the record.

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[*Lord Brougham*, to respondents. — Your ground is, I suppose, that although there was a general averment of user made, there ought to have been a specification of persons, time, and place in the appellant's statement, in order to put you on your guard?

Mr Rutherfurd. — Precisely so.]

That was not the ground taken in the Court below; there the objection was, that particular instances of user having been averred, the party was misled to think that these alone would be proved. If the general averment with which the statement set out was sufficient, the addition of particular instances could not destroy its efficacy; that was only so much favour to the party. That the general averment was sufficient, is shewn by the terms of the 8th section of the 6 Geo. IV. cap. 120, and the 105th section of the Act of Sederunt, 11th July, 1828, and the application these received in Leys, Masson, & Co., 5 *W.* and *S.* 384; Wilson *v.* Beveridge, 10 *S.* and *D.* 110; Rutherfurd *v.* Carruthers, 1 *D. B.* and *M.* (*N. S.*) 1109; and in Dalzell *v.* Queensberry Executors, 4 *Murray*, 14, where the Judge said, — "It cannot be required to aver every fact that is to prove or "make out the case." In M'Donald *v.* M'Kay, the Court reprehended the statement of every fact and circumstance to be proved, as this House did in Gillon *v.* M'Kinlay, 5 *W.* and *Sh.* 472.

There is no special rule differing cases on questions of patents; that is shewn by Russell *v.* Crichton, 16 *S.* and *D.* 1157, where the averment was quite general of use "in Glasgow and Edin- "burgh, or elsewhere in Scotland;" there the issue given was, whether the defender did, "at Glasgow, &c." and no restriction was put upon the evidence attempted to be led.

The averment of the particular instances could not mislead the party, because it is expressly qualified by the words "in parti- "cular, among others," thereby giving warning that there were

other instances to be proved; and moreover, the general averment was of user "in England and Scotland," while the particular instances were confined to England alone, shewing, that, as to Scotland, the party meant to rely on the general averment.

If it be held that the 5th section of 5 and 6 Will. IV. c. 83, applies to Scotland, then the note of objections required by that section was given, and the party had in it notice of the particular instance in regard to which the evidence rejected was tendered.

[*Lord Chancellor.* — I should doubt if that clause applied to Scotland.]

The statute in its other clauses certainly embraces both ends of the kingdom, but if this section does not apply, the general averment of user was sufficient.

[*Lord Chancellor.* — I was much struck with the case of Russell *v.* Crichton, but on looking at the report, I don't find the question raised.]

No observation was made on the matter, but the issue was allowed generally as to Edinburgh or Glasgow.

XIth Exception. With regard to this Exception, the argument at the bar on both sides was directed to ascertain the meaning in which the Judge used the expressions which gave rise to the Exception. For assuming them not to refer to experiment, but to trial, in the sense of use, discontinued, of a completed invention, the counsel for the Respondents did not attempt to maintain the Charge. As the argument on this Exception amounted to no more than a critical disquisition on the words of the Charge, it does not require farther notice.

Mr Solicitor-General and Mr Rutherfurd, for the respondents. — Ist Exception. The only issue under which the evidence tendered, and to which this Exception refers, could have been tendered, is the first, being a general issue. Under such an issue it was not competent to offer evidence as to facts of prior user,

without disclosing them on the record, 6th and 8th section, 6 Geo. IV. cap. 120.

The form of the general issue was adopted as the more convenient; but, with the view to prevent surprise and frequent motions for new trials, the statute required that the case to be proved should be averred on the record. A distinction is taken in the statute between the grounds of action and defence, and the facts and circumstances on which they are to be rested. And it is the duty of the Judge, when evidence is tendered, to refer to the record to see whether the evidence comes within the case there made.

The issue would have been unobjectionable, no doubt, though the averment had been general; the only consequence would have been, that the party could not have led evidence at all. So here the issue was unobjectionable, and the party was entitled to lead evidence under it, because the averments were not general but special; but he was not entitled to lead evidence beyond the averments under the words "in particular, among other instances," as shewing that those stated were not alone intended to be relied on:—this would go to create all the inconvenience which the statute, by requiring special averment, intended to remedy.

In Wilson *v.* Beveridge, the question being as to partnership, and what had occurred between the parties themselves, to have required a special statement of all the facts, would have been to require a statement of the evidence; but in Gye *v.* Hallam, 10 *S.* and *D.* 710, a new trial was allowed, because the pursuer, after specifying on the record various errors in account, had gone into evidence of many more, and thus taken the party by surprise. In Leys, Masson, and Co. 5 *W.* and *S.* 384, the attempt was to alter the issue, not to limit the evidence, and neither in M'Donald *v.* M'Kay, nor in Gillon *v.* M'Kinlay, was any question raised upon the issue. As to Russell *v.* Crichton,

there was no question raised there as to the issue, but although the averment was as to use in Edinburgh and Glasgow, "or "elsewhere in Scotland," these words were left out of the issue, which was confined to Glasgow alone.

Lord Advocate in reply. — The general issue is no doubt to be qualified by the record, but the party, in leading evidence under it, is only limited by not having made any averment at all on the subject attempted to be proved, or by having so limited his statement as necessarily to preclude evidence beyond it; but it was never intended in principle, nor has it been observed in practice, that the party is to state in detail every circumstance he is to lead in evidence. *Adams on Jury Trial*, p. 78. In Gye v. Hallam, the new trial was allowed, in order, not to exclude, but to admit, the evidence tendered.

LORD CHANCELLOR. — My Lords, the principal question in this case arises out of the 11th exception. The learned Judge stated to the jury what he considered to be sufficient evidence to support prior use so as to invalidate the patent. The learned Judge expressed himself in these terms; he says, "You will "observe that it is settled that the trials founded on as a proof "of prior use must have been public, must have been continued, "not abandoned, must have continued to the time when the patent "was granted; I do not say to the very exact period, but it "must have been known and used as a useful thing at the time."

Now, my Lords, the first question that arises upon this charge is, what the learned Judge meant by the word "trials." The word "trials," as I understand it, does not in that passage import experiments going on for the purpose of concluding or perfecting the invention. But I understand the word "trials" to have been used in a different sense. It could not have been used in the former sense, for this reason, that the distinction which the

learned Judge draws, and draws with so much pains and so much care, could not have applied to that meaning of the term "trials," because, if they were mere trials and experiments in the progress of the invention, it was wholly immaterial whether they were continued, or whether they were abandoned. In neither case could they have been made use of as evidence of prior use, for the purpose of invalidating the patent.

It becomes necessary, therefore, from the context, to consider what it was that the learned Judge meant by the word "trials;" and I think that sufficiently appears by a reference to the former passage, which former passage, indeed, is only separated from the passage in question by the two cases to which the learned Judge refers. He says, — "The cases referred to at the bar "have settled that the use must be public use, that the existence "and trial of regular machines of the very same sort, if aban- "doned, if not used and introduced into practice, is not public "use and exercise thereof in the kingdom." Then he goes on, after stating the two cases, thus, — You will observe that it is "settled, that the trials founded on as a proof of prior use must "have been continued, not abandoned, must have continued to "the time when the patent was granted." He is therefore obviously speaking of the same trials to which he had before referred, namely, trials of regular machines of the very same sort. And he says, those trials of regular machines of the very same sort, if abandoned, will not be evidence of public use. And that he so meant is quite obvious also from the concluding part of the sentence, when he says, — "But it must have been "known and used as a useful thing at the time." What is the meaning of that? The invention must have been known and used as a useful thing at the time. So that I understand the proposition of the learned Judge to be this, that if the machine had been made, and had been put in trial, unless those trials had gone on, and the machine had been used up to the time of

the granting of the letters-patent, it would not be evidence of prior use, so as to invalidate the letters-patent.

Now, I am obliged to say, with all deference to the learned Judge, and with all respect for the learned Judges of the Court of Session, that I think in that respect they are mistaken; and that if it is proved distinctly that a machine of the same kind was in existence, and was in public use, although the use was discontinued, still that is sufficient evidence in support of prior use, so as to invalidate the letters-patent. That is, if use or if trials had been made of the machine in the eye and in the presence of the public, it is not necessary that the use should come down to the time when the patent was granted.

Now, my Lords, it appears to me that the learned Judges in the Court below were misled by the two cases that were cited by the learned Judge who presided at the trial. There is an expression supposed to have been made use of by Mr Justice Pattison at a trial at *nisi prius*, upon which reliance was placed, reported, I think, in Mr Godson's book. Whether the learned Judge did really make use of this expression or not, I have no means of knowing. But afterwards, when that case came before the Court of Exchequer, and when reference was made to that passage in the summing up of the learned Judge to whom I have referred, Mr Baron Alderson, apparently with the assent of the rest of the Court, commented upon that observation, dissenting from the position, and expressed an opinion that that learned Judge, if he had so expressed himself, had expressed himself incorrectly in point of law.

Again, my Lords, in the other case which has been referred to, which is also a *nisi prius* case, at which the Chief Justice of the Common Pleas presided, similar expressions are imputed to him. But in a subsequent case of Cornish *v.* Keene, which came before the Court of Common Pleas, in which they took time to consider their judgment, and in which the learned Chief Justice

afterwards pronounced the opinion of the Court, he did not state the position in those terms, but said, that if before the granting of the letters-patent the machine had been in use, that was prior use sufficient to invalidate the letters patent, and it was not necessary that the contrivance or the machine should be in use up to the time of the letters-patent. If it is discontinued, provided it has been once in public use, and the recollection of it has not been altogether lost; if it has been once publicly used, that will be sufficient to invalidate the letters-patent, although the use may be discontinued at the time when the letters-patent were granted.

Now, my Lords, I apprehend that that is the law, and the known law, upon the subject in this country. I never heard it before questioned that the notorious public use of an invention before the granting of letters-patent, though it may have been discontinued, is sufficient to invalidate the letters-patent.

Then, my Lords, the remaining question for consideration is this, and it is an important one, Whether, if the learned Judge laid down the law incorrectly to the jury, this was calculated to mislead the jury in the verdict that they were to pronounce. Now, I apprehend that in this case it was eminently calculated to mislead the jury, and for the reasons which I am about to state. The question related to the proceedings that had taken place at the Bradley Iron Works. It was contended that a machine similar to that of the plaintiff's had been publicly used at those works. And another point was raised also as to whether or not it was a mere experiment, or the actual use of a complete machine.

Now, it is quite obvious that as these were points for the consideration of the jury, the jury were liable to be misled, and greatly misled, by the summing up of the learned Judge, for the reason which I am about to state. When they retired for consideration, they would naturally say, "It is a question for our "consideration, whether this machine used at the Bradley Works

" was a machine similar to that of the plaintiff's. And another " consideration that we have before us is this, was that machine " simply in the course of experiment, or was it a complete " machine?" In order to disentangle themselves from the difficulty of deciding this question, they might immediately have said, and they would naturally have said, " It is quite immaterial " for us to consider those points, because, as that machine was " afterwards discontinued, the learned Judge has told us, that " although we should be of opinion that the machines were the " same, although we should be of opinion that the machine was " not merely in the course of invention, but that it was com- " pleted for the purpose of practical use, yet the learned Judge " has told us, that unless that use has come down to the time, or " about the time, of granting the letters-patent, it cannot be " made use of as prior use for the purpose of invalidating the " letters-patent. It is unnecessary, therefore, for us to consider " those points." That would have been the natural course which the jury would have taken. Therefore it is perfectly obvious, that if the learned Judge be incorrect in the manner in which he stated the law in the particular which I have stated, it was calculated to mislead the jury.

Now, my Lords, if this were a motion for a new trial, having read the evidence, and having attended to the record, I really for one should feel strongly of opinion that we ought not to have disturbed the verdict, for I think the verdict is supported by the evidence. But when we come to consider a bill of exceptions, we are bound to take a different view of the subject, and if we are of opinion that the law was laid down incorrectly, and if we are of opinion that the jury may have been misled, we have no discretion to exercise, we are bound to say under such circumstances, that the exception must be allowed.

Under these circumstances, my Lords, I am of opinion, for the

reasons which I have thus shortly stated, that the eleventh Exception ought to be allowed.

With respect to the other Exceptions: first, as to the first exception, I am quite satisfied by the arguments at the bar, that the learned Judge did right in refusing to admit the evidence. The arguments at the bar have satisfied me, that according to the law of Scotland, and according to the course of proceeding in Scotland, the Judge in that respect was correct. And with respect to the other exceptions, the eighth and ninth, it is unnecessary for me to enlarge upon them, because my noble and earned friends who are near me, and myself, expressed our opinions upon those points in the course of the argument, and I understood that they were ultimately abandoned by the learned counsel.

Under these circumstances, my Lords, I should recommend your Lordships to allow the eleventh exception, and to disallow all the rest.

Lord Brougham. — My Lords, I entirely agree in the view taken, and for the reasons so luminously expressed by my noble and learned friend on the woolsack, that the Exceptions, all but the eleventh, were properly disallowed by the Court before whom the bill was brought, and that your Lordships should disallow those exceptions here, affirming the judgment below; but I also entirely concur with my noble and learned friend, that we have no choice here but to allow the eleventh Exception.

This is, as my noble and learned friend has justly remarked, another case than that of an application for a new trial, and other discretion within other bounds alone remains to us to exercise. If we are of opinion, first, that the law has been mistaken, and under a misapprehension of it, it has been erroneously delivered by the Judge to the jury; and if we are, secondly, of opinion that the misdirection in point of law, the mistake in point of law,

committed by the learned Judge, had a direct tendency, I may almost say an inevitable tendency, to mislead the jury in the conclusion to which they should come, and the verdict which they should deliver, then, my Lords, both of these questions being answered in the affirmative, that the law was mistaken, and that the mistake tended to mislead the jury in their verdict, we have no choice, but must allow the exception.

Now, my Lords, a more important mistake in point of law, your Lordships will give me leave to say, could not possibly have been made by the learned Judge, than that into which the learned Judge fell upon the present occasion. And I will not allow it to be said for one moment, in dealing with this question, that there is any thing doubtful, that there is any thing speculative, that there is any new law to be laid down, or even any new topics in respect of the law about to be broached here in dealing with the direction of the learned Judge; for I speak with all possible respect for that learned Judge's great ability and experience in his profession in Scotland, when I say that this law, which has been mistaken here by his Lordship is a matter of as perfect certainty, as thoroughly known, and as little drawn into doubt in Westminster Hall, where the law is administered touching the construction of the statute of James, the patent act, as any one branch of the law most commonly known and most frequently administered by our courts.

My Lords, the mistake into which the learned Judge fell, and in which he was followed by his brethren in the Second Division, appears to me to have arisen from this. The patent act contains two exceptions. The proviso under which the monopoly is allowed to be granted, notwithstanding the statute prohibiting all monopolies for the future, saves to the Crown the power formerly general, and now become limited by force of the act in two cases alone. In cases of inventions, the patent right, the monopoly, may be granted by the Crown to a person, provided he be "the

" first and true inventor;" and provided also, secondly, that at the time of the grant of the monopoly of the patent, others shall not have used the same. Consequently, observe the result, if either he is proved not to be the true inventor, or if, being the true inventor, nevertheless it be proved that there has been an user by others, in either the one case or the other, the right flies off, the condition does not attach, which condition precedent must have existed in both those particulars, to enable the Crown to come within the benefit of the proviso, and to be saved from the prohibition of the act against all future grants of monopoly.

Now, the Court below never seem to have kept these two points distinct, which are perfectly distinct in their own nature. For a person may be disentitled to a patent who is the first inventor, on account of user at the time, or he may be disentitled to a patent, though not used at the time, if he was not the first inventor; both titles must concur.

Now, see how this mistake, with reference to the abandonment and continuance, got in through the door which I have just shewn your Lordships, they allowed to be left open for error creeping in. If an invention has not been completed, but if it all rests in experiment and trial, then it is a most material circumstance, as a test whether any given act of a party other than the inventor, was trial or complete invention, it is a most salutary and important test to apply with a view to ascertain that, to see whether he abandoned it or continued it. If he abandoned it, if he gave it up altogether, and for twenty or thirty years did nothing, it is a very strong presumption that it was only experimental, not an invention completed. But suppose it was complete, and suppose it is admitted not to have been a trial; suppose it is allowed to have been an invention executed, if I may so speak, — not merely executory, or not merely in the progress of invention, but an invention completed, — then it is one of the greatest errors that can be committed in point of law to say that,

with respect to such an invention as that, it signifies one rush whether it was completely abandoned, or whether it was continued to be used down to the very date of the teste of the patent. Provided it was invented and publicly used at a time twenty or thirty, or, as in this case, forty years ago, it is perfectly immaterial — not immaterial to the second question arising upon the second condition, namely, whether it was used or not at the time of the granting of the patent, but totally immaterial to the other question, which is equally necessary to be ascertained in the inventor's favour, whether or not he was the first and true inventor; for he must be the first and true inventor, as well as the only person using it at the time, otherwise he is not entitled to the letters-patent. Herein just lies the error which has been committed by the learned Judge. He dwells upon that as if it were material in both cases; that is to say, to the question of "first and true "inventor," to which it is not material, as well as to the question of user at the time, to which it is material.

My Lords, I entirely agree with my noble and learned friend, in considering that there can be no doubt that in using the word "trial" here, the learned Judge does not mean it as experiment, because in page 73, just before the two cases are cited, he speaks of "the existence and trial of machines of the very same sort," and then he makes his observations upon it. Now, "existence" implies invention; "trial" there, is rather user than experiment, and all that passage taken with what follows at the top of the next page, after citing the two cases, and somewhat misunderstanding the import of the two cases, clearly relates to invention executed and completed.

My Lords, it is always a dangerous thing in applying a *Nisi Prius* dictum, to take that dictum as law, when it goes against the known law laid down in cases in *Banc*, which have received the full consideration of the several courts before whom the question arose; but it is still more dangerous, where we are dealing

with the law of another country, to rely upon the chance *dicta* of judges of *Nisi Prius*; but it is most of all perilous, and most of all apt to lead judges into mistake, if they rely upon a report not in any of the regular term reports, or even *Nisi Prius* reports, but in some work, though of a learned person, yet who quotes it without authority, because it is very possible that there may have been a misapprehension of what fell from the learned Judge; and that possibility becomes a high probability, when it turns out to be inconsistent with the reason of the case, and with other known authorities in the regular sources from which you obtain accounts of what has passed before the learned Judges.

My Lords, I doubt very much whether that fell from Mr Justice Pattison which has been stated. If it did, it has been negatived by the assent of the Court of Exchequer to what fell from Mr Baron Alderson when the subject was mentioned. As to what is supposed to have fallen from the learned Lord Chief Justice also at *Nisi Prius*, I have the most positive and indisputable authority to state, that the law as laid down now by the Lord Chancellor in his statement, and as I have now stated my opinion upon it also, is, notwithstanding what has been supposed to have fallen from the learned Chief Justice, the clear and undoubted law upon the subject; that in the opinion of the learned Chief Justice, it is a thing that will not admit of dispute; that it is an unquestionable position, as to which, no doubt whatever can be entertained — and I believe he would express himself as much astonished of ever having heard of its being doubted, as I have done in the course of the observations which I have taken leave to submit to the House.

All these matters being duly taken into consideration, and there being, in my apprehension, no kind of doubt that the jury upon the trial would say, "why should we consider whether it "was used at the Bradley works or not? why should we consider "whether it was a trial or a completed invention? Be it so,

" that it was used forty years ago; be it so, that it was a complete " invention, we hear the learned Lord Justice Clerk telling us, " that we need not trouble ourselves upon these points, for it is " enough for us if it was abandoned, and that takes the facts out " of the case, and leads us to find a verdict the other way."

Upon these grounds, my Lords, we have no choice in this application, it being a bill of exceptions, we have no hesitation in saying, that the law was misconceived and misstated to the jury. The law is undeniable, it is a matter of no doubt or hesitation among any men in this country, who have been accustomed to administer it, or, I will venture to say, with any practitioner whose opinion is entitled to any weight. And I am also of opinion, that the law so laid down tended to mislead, and must necessarily have tended to mislead the jury. Upon these grounds I have no hesitation in supporting the proposition of my noble and learned friend, that this 11th Exception must be allowed.

I ought to apologize to your Lordships after the very luminous statement of opinion, (in which I entirely agree as well as in the reasons for it,) of my noble and learned friend the Lord Chancellor, for having occupied so long a portion of your time in adding the small weight of my opinion to his; but I deemed it necessary upon this account, that it might clearly appear to practitioners here, as well as elsewhere, that no doubt whatever has been entertained upon the subject; and also that it might appear in what way the error crept into the very learned and able Judge's directions to which I have adverted.

Lord Campbell. — My Lords, this case has been treated so copiously and lucidly by my noble and learned friends who have preceded me, that I shall occupy but a very few moments of your Lordships' time in offering a very few observations upon it. I entirely concur in the opinion that has been expressed upon the first Exception. I think that the learned Judge was perfectly

justified and bound at the trial to reject the evidence which was rejected. It seems to me that the section of the recent act of Parliament about giving notice, does not apply to proceedings in Scotland.

Lord Brougham. — Clearly not.

Lord Campbell. — There are other sections of the act of Parliament that apply to Scotland, but I think that this does not. The language employed shews that it was not so intended, and there was this plain reason for abstaining from carrying into Scotland that provision, — namely, that the law of Scotland required no such amendment, because by the very salutary practice prevailing in that country there is no danger of surprise, the Condescendence and the statement upon the record being to be looked at as confining the general issue that might be granted to try the merits of the question. I am therefore clearly of opinion, that where an issue of this sort, which, in the North, is called a general issue, is granted, the learned Judge at the trial is fully justified in looking, and ought to look, at the record, and to confine both parties to the facts and circumstances which are therein alleged. Looking at the record in the case, it seems to me that it excludes evidence of this trial which is supposed to have taken place at Irvine, and that the defender was not justified in entering into evidence of such trials at any of the places which are not specified in the record.

I should have been most sorry indeed to have at all prejudiced the salutary practice which prevails in Scotland upon this subject, and I wish that in England similar rules prevailed. According to the ancient practice of pleading in England, there was notice given, because in a Writ of Right the demandant stated specifically the title he made. But in an Ejectment nobody can tell what case is to be made on the part of the plaintiff, and I can say from my own experience, that I have repeatedly gone into Court, being counsel for the defendant, where an action was

brought to recover a large estate, not only ignorant of the particular facts that were to be given in evidence, but not knowing what title was to be made; whether the lessor of the plaintiff claimed as heir-at-law or under a deed; whether he impeached the title of the purchaser in himself; or whether it was a question of parcel or no parcel. That certainly leads frequently to surprise in England, and renders it necessary on the ground of surprise, that a new trial should be granted. A much more salutary system prevails in Scotland, which I know this House most highly approves of, and will most carefully guard.

The other Exceptions, till we come to the 11th turn upon the construction of the patent. Now, in one stage of these proceedings, I certainly did entertain some doubt on that subject. But after the construction put upon it by the learned Judges of the Court of Exchequer, sanctioned by the high authority of my noble and learned friend, now upon the woolsack, when presiding in the Court of Chancery, I think the patent must be taken to extend to all machines, of whatever construction, whereby the air is heated intermediately between the blowing apparatus and the blast furnace. That being so, the learned Judge was perfectly justified in telling the Jury, that it was unnecessary for them to compare one apparatus with another, because confessedly that system of conduit pipes was a mode of heating air, by an intermediate vessel between the blowing apparatus and the blast furnace, and therefore it was an infraction of the patent.

But, my Lords, when we come to the 11th Exception, I most sincerely and deeply regret, after all this litigation, and when very probably the verdict would have been the same, if the direction had been unexceptionable, I most sincerely regret that we are bound to allow it. I have struggled as much as I could against this Exception. I was very anxious, if possible, to consider either that the learned Judge was talking merely of experiments, or if he was wrong in point of law, that the direction was imma-

terial. But, my Lords, after very anxious consideration of the record and the proceedings, it is impossible for me to get rid of the exception, either upon the one ground or the other. For the reasons stated by my noble and learned friends, who have preceded me, it seems to me now quite clear that the learned Judge was not speaking of experiments, but that he was speaking of prior use of the invention. That appears from the language of the learned Judge himself. It appears still more clearly from the Exception to which he did not object. It appears still more clearly from the language of the learned Judges of the Second Division, when the case came to be discussed before them. They did not at all consider that the observations of the learned Lord Justice Clerk, referred to experiments. They all seem to have considered that it applied to the prior use of a perfect machine.

Then if that be so, there can be no doubt whatever, that the law which he laid down upon the subject was mistaken; because to suppose that there may have been a prior use of the invention, — of the perfected invention for which the letters-patent are granted, — and that that prior use, publicly known, will not vitiate the patent, if it has been abandoned but a few weeks before the date of the patent, strikes us in this part of the country with astonishment. That certainly is not the law as we have ever understood it, and I think after the opinions of my noble and learned friends who have preceded me, I can have no hesitation in saying that that cannot be considered as the law of this country.

The learned Judges in Scotland seem to me, with great deference, to have been misled by the expressions that are ascribed to Mr Justice Patteson, and to Lord Chief Justice Tindal. Now, I was counsel in the case of Jones *v.* Pearce, and I believe, that the account of it in Godson is substantially correct. But what Mr Justice Patteson may have said in that case, and what Lord Chief Justice Tindal may have said in the other

case, taken in conjunction with the whole of their direction, amounts to this, that the abandonment may be material for the assistance of the Jury to consider whether it be a perfect invention or not; but assuming it to be a perfect invention, the abandonment becomes wholly immaterial. The learned Judge therefore in Scotland, in assuming that the direction of the learned Judges in England to the jury upon a point of fact, to assist the jury upon the point of fact, was laid down by the learned Judges in England as a point of law, was certainly mistaken.

That being so, the only question that remains is this, whether this misdirection shall be considered as immaterial; but when I look at the form of the issue, I cannot say that it was immaterial, because the issue is, "whether the invention, as described in the "said letters-patent and specification, is the original invention of "the pursuer."

Now you cannot say that it was the original invention of the pursuer, within the meaning of the issue, if it had been publicly known and practised by others before the patent was granted. It has been said, that there was no evidence. But I think that is a mistake. What conclusion the jury would have come to I know not; but at the Bradley iron works there was such a machine, as Mr Rutherfurd acknowledged at the bar, as would have amounted to an infraction of the patent if the use of it had been subsequent to the patent. Then that being so, I know not what conclusion the jury might have arrived at. They might have thought that this was a perfect machine, that it was the same machine, and that it had been publicly used. If they had been of that opinion, although it had been abandoned, they ought to have found a verdict for the defender.

Under these circumstances, I regret exceedingly that I am obliged to concur in the opinion that has been expressed by my noble and learned friends, that this 11th Exception must be allowed, and the consequence of that will be, that there must be

a *venire facias de novo*, and that the case must be tried by another jury.

Lord Chancellor. — My Lords, I wish to say, that if there had been any doubt whatever with respect to the meaning of the words used by the learned Judge in summing up, those doubts would be removed by the concluding words, " that it must have " been known and used as a useful thing at the time." What? The invention " must have been known and used as an useful " thing at the time of the granting of the letters-patent." That shews demonstrably what was intended.

It must not be understood, that your Lordships, in the judgment which you are about to pronounce, have given any decision upon this state of facts, namely, if an invention had been formerly used and abandoned many years ago, and the whole thing had been lost sight of. That is a state of facts not now before us. It is not raised upon this record. Therefore it must not be understood that we have pronounced any opinion whatever upon that state of things. It is possible that an invention may have existed fifty years ago, and may have been entirely lost sight of and not known to the public. What the effect of that state of things might be, it is not necessary for us to pronounce upon.

Lord Brougham. — It becomes like a new discovery. Reverse upon the 11th Exception and Affirm upon the others.

Mr Rutherfurd. — Affirm *quoad ultra*. My Lords, may I be allowed to suggest that remitting to the Court below, to proceed accordingly, would be sufficient to enable the Court to give directions for a new trial. Of course that would lead instantly to a new trial.

Lord Brougham. — Perhaps that is the better way.

Mr Rutherfurd. — It will be better if your Lordships will also remit to the Court of Session, to deal with the question of costs, including this appeal, according to the ultimate result.

HOUSEHILL Co. *v.* NEILSON. — 6th March, 1843.

Lord Brougham.—No, you cannot have the costs of this appeal, when upon the main point there is a reversal.

Mr Rutherfurd. — Unless your Lordships give a special direction.

Lord Chancellor. — It is not a case in which we ought to give costs on either side.

Ordered and Adjudged, that the interlocutor of the 27th January, 1842, complained of in the said appeal, be affirmed with costs. And it is farther ordered and adjudged, that the interlocutor of the 20th July, 1842, also complained of in the said appeal, in so far as such interlocutor disallowed the eleventh Exception stated in the Bill of Exceptions, and found the pursuers in the action in the Court below entitled to the expenses incurred by them in the discussion on the said Bill of Exceptions, be reversed. And it is also farther ordered and adjudged, that in all other respects the said last mentioned interlocutor be affirmed. And it is declared, that the said eleventh Exception ought to be allowed. And it is farther declared, that neither party is entitled to the expenses incurred by them respectively in the discussion on the said Bill of Exceptions in the Court below. And it is also farther ordered, that with these declarations, the cause be remitted back to the Court of Session in Scotland to proceed farther therein, as shall be just and consistent with the said declarations, and this judgment.

GRAHAM, MONCRIEFF, and WEEMS. — ROY, BLUNT, and Co. Agents.

[Heard, 2*d March*, — Judgment, 9*th March*, 1843.]

WILLIAM MACKERSY, *Appellant.*

MESSRS RAMSAY, BONARS, and Co., *Respondents.*

Principal and Agent. — A banker, receiving a bill for transmission to a foreign country, in order to its acceptance and payment, is liable for the acting of the agents employed by him for that purpose.

Costs. — Where the interlocutor of the Inner-House, recalling an interlocutor of the Lord Ordinary, was reversed, and that of the Lord Ordinary affirmed, it was with costs to the appellant.

LINDSAY MACKERSY, residing in Edinburgh, had an account with Ramsay, Bonars, and Co., bankers in the same city, upon a cash credit with security.

On the 10th of August, 1829, Mackersy wrote Ramsay and Co., enclosing a bill on Clelland of Calcutta, for L.100, and saying, "which be so good as forward for payment, placing the "proceeds, when paid, to my credit." Two days afterwards, Ramsay and Co. sent the bill to Coutts and Co., bankers in London, saying, "which we will thank you to forward for pay-"ment, and advise us when you hear it is paid." Messrs Coutts and Co., on the 24th August, 1829, sent the bill to Palmer and Co., of Calcutta, "for collection, the proceeds of which you will "please remit us, after making the usual deduction."

On the 21st August, 1830, Coutts and Co., in answer to an inquiry by Ramsay and Co., made in consequence of a similar inquiry at them by Mackersy, wrote Ramsay and Co. that they had received advice of the acceptance of the bill from Palmer and Co., "and that, when paid, they would make us a remit-"tance." Inquiries as to the payment of the bill continued

throughout the remainder of the year 1830, and the years 1831 and 1832.

On the 10th February, 1832, while these inquiries were as yet unanswered, Mackersy sent a second bill on Clelland for L.100, to Messrs Ramsay and Co., in a letter, of which the following is a copy, — "I beg leave to enclose a draft, (first and second of "exchange,) on W. L. Clelland of Calcutta, dated 9th current, "at thirty d/d pro L.100, which be so good as forward for pay- "ment." To this Ramsay and Co. returned the following answer, "We have your letter of yesterday covering your draft "at thirty days on W. L. Clelland of Calcutta, pro L.100, "which we shall forward for payment, and at maturity place to "your credit."

The same day Ramsay and Co. sent the bill to Messrs Coutts and Co., their correspondents in London, in a letter in which they said, "Enclosed is Mr Lindsay Mackersy's bill on W. L. "Clelland, at thirty days, for L.100, which we will thank you to "get forwarded for payment, advising us when the amount is "received." On the 29th of February, Coutts and Co. sent the bill to Alexander and Co., their correspondents at Calcutta, in a letter in which they said, "We enclose a bill on W. L. "Clelland, Esq., which we will be much obliged to you by your "obtaining payment of, and remitting us the proceeds less your "charges."

The first bill, when it fell due, was paid to the assignees of Palmer and Co. that firm having become bankrupt before that time, and the amount was subsequently paid over to Coutts and Co.'s agents in Calcutta, as will appear in the sequel.

The second bill was paid by W. L. Clelland, when due, on the 7th of August, 1832, to Alexander and Co. Alexander and Co. credited the account of Coutts and Co., in respect of this bill, as follows: —

"1832, August 7, By cash received. L. Mackersy draft on

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" W. L. Clelland, in favour of Messrs Ramsay and Co., p.			
" L.100, at 1s. 10d. per Sa R., . .	1090	14	6
" 1833, January 10, Interest on Sa R.1090, for			
" 5 months 4 days, . . .	37	5	3
	1127	19	9"

Five months after recovering payment of the bill Alexander and Co. also became bankrupt, without having made any actual remittance to Coutts and Co. in respect of the bill.

Throughout the years 1831 to 1834, correspondence passed between Mackersy, Ramsay, and Co., and Coutts and Co., in regard to both bills. On the 7th December, 1832, Ramsay and Co. sent Mackersy an abstract of a letter they had received from Coutts and Co., in which Coutts and Co. said, that the proceeds of the first bill would be paid on their order, and that they would send out instructions for its remittance.

On the 8th of December, Mackersy thanked Ramsay and Co. for this information, and added, " You will of course take care, " that interest, from the time at which bills on India are usually " paid here, be also recovered. I will be glad to hear from you " when you have advices of the payment of my other bill. With " your permission, I shall leave the balance of my cash account " unsettled till then, but should you have any objections, it can " be paid up whenever you wish it."

In March, 1834, Mackersy, while in ignorance as to the payment of the second bill, asked Ramsay and Co., whether the first bill had " been placed to his credit," and whether " advice of payment of the other bill had been received." The respondents answered, that " no remittance on account of them " had been received by Coutts and Co.," and at the same time they transmitted their account, balanced against Mackersy by L.187, 4s. 11d.

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Mackersy, on 7th April, 1834, expressed his surprise to Ramsay and Co., "that no remittance, in payment of either of "these bills, had yet reached Coutts and Co.," and his desire that they would see that interest was accounted for. At the same time he enclosed an order for payment of the L.187, 4s. 11d.

On the 23d June, 1834, Ramsay and Co. sent Mackersy an extract of a letter, which they had received from Coutts and Co., in which Coutts and Co. advised payment of the second bill to Alexander and Co., and said, that the dividend upon it, from their estate, would be applied for, and placed to Ramsay and Co.'s credit, and that they had sent out instructions for remittance of the proceeds of the first bill.

On the 30th June, 1834, Mackersy intimated to Ramsay and Co. that he held them responsible for their agents, and liable to him for the amount of both bills.

In November, 1835, Ramsay and Co. wrote W. Mackersy, (Lindsay Mackersy being dead by this time,) that Coutts and Co. had received the proceeds of the first bill, and that they, Ramsay and Co., had accordingly placed the amount, less L.2, 4s. 6d., to the credit of Lindsay Mackersy's account. This deduction of L.2, 4s. 6d., consisted of L.1 for commission, and L.1, 4s. 6d. for postages, retained by Ramsay and Co.

In the result, Mackersy's account was credited by Ramsay and Co. with the proceeds of the first bill, without any allowance for interest during the years which had elapsed from the time at which the proceeds had been received; and as to the second bill, the proposal was to give Mackersy the dividends from Alexander & Co.'s estate, upon the proceeds of this bill, without any allowance for interest.

In October, 1836, the respondents brought action against W. Mackersy, as executor of Lindsay Mackersy, for payment of a balance of L.97, 19s. 11d., upon Lindsay Mackersy's cash account.

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Mackersy, in his defences, set forth the circumstances in regard to the two bills sent to India, and insisted that he was entitled to receive credit for the amount of the second bill, and interest on the amount of both bills, and pleaded, *inter alia*, — "2. The "pursuers are liable for the interest due upon the bill first above "mentioned from the date of payment, or from a reasonable "date, when the remittance might have been made.

"3. The pursuers are bound, by their written engagement, to "give credit for the second bill of L.100 from the time of its "coming to maturity, or at least from the time when it might "have been paid.

"4. The pursuers are at least bound to procure and furnish "to the defender a full explanation of the circumstances attend- "ing the transmission, negotiation, and payment of the bill, "and the state of accounts between the parties concerned; as "also, to give credit to the defender for any dividend that may "have been received from Alexander and Company's estate."

On the 21st December, 1839, the Lord Ordinary sustained Mackersy's plea, that "in accounting with him Ramsay and Co. "must give him credit for the principal and interest of the two "bills in question," and assoilzied him from the action.

The Court altered this interlocutor, and decerned in terms of the libel. The appeal was against the interlocutor of the Court.

Mr Kelly, and Mr Wilmer, for the appellant.—The argument for the appellant is fully noticed by the Peers who delivered judgment. The authorities cited by them were Cartwright *v.* Hately, 1 *Ves.* 292; Pinto *v.* Santos, 5 *Taunt.* 447; Schmaling *v.* Thomlinson, 6 *Taunt.* 147; M'Donald *v.* M'Donald, *Hume's Dec.* p. 344; Thomson *v.* Logan, 5 *Bro. Supp.* 266; *Paley on Prin. and Ag.* p. 5; *Storey on Prin. and Ag.* p. 166; Stevens *v.* Badcock, 2 *B.* and *A.* 354; Cullen *v.* Backhouse, 6 *Taunt.* 148 *note*;

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Mathews *v.* Haydon, *Esp.* 509; M'Vicar *v.* M'Gregor, *Hume's Dec.* p. 348.

[*Lord Campbell.* — If you obtain a reversal as to the second bill alone, that will be all you desire, I suppose — it will turn the balance.] Certainly.

The Lord Advocate, and Mr Pemberton Leigh, for the respondents. — Nothing farther was undertaken by the respondents than payment over of the proceeds of the bills, when they themselves should receive them. It was no part of the contract between the parties, and the correspondence shews, that it was not the intention, or understanding, of either of them, that the receipt in India, by persons whom it was known the respondents must employ there, should be the receipt of the respondents. If the respondents could themselves have received payment, and had, nevertheless, employed others, there might be some ground to allege a responsibility by them for the acts of these parties; but it was known to Mackersy that the respondents had no branch of their firm, nor any agent in Calcutta, and that the only way in which they could negotiate the bill was through a house in London having these advantages. When, therefore, Mackersy intrusted the bill to the respondents, with this knowledge, he must be understood to have done so at the risk of these foreign parties failing in their duty. The bill was not discounted by the respondents so as to give the form of a purchase. There was a mere transmission for negotiation. Accordingly, when Mackersy was advised in 1832, that the first bill had been paid, he did not insist that the amount should immediately be placed to his credit. He waited until the money should be actually remitted, and even in 1834, he did not insist that the proceeds of the first bill should be placed to the credit of his account, so as to reduce the balance for which he was then giving an order. He only complained that the remittance had not then been

made, shewing his own understanding of the contract between the parties as not implying any right, on his part, to receive credit from the respondents, until they themselves had received the money.

LORD CAMPBELL. — My Lords, I am humbly of opinion, that the interlocutor of the Lord Ordinary was right, and that it ought to be affirmed.

Ramsay and Company, in the way of their business as bankers, were employed for reward by a customer, with whom they had a cash account, to obtain payment of a bill of exchange, drawn on a person in Calcutta, payable to their order. They did not become the owners of the bill, or discount it, but they were to receive payment for Mackersy, having a lien on the bill and its proceeds, for any balance due to them from him. The payment was to be made to persons to be employed by them, to whom the bill must be indorsed. Mackersy was not to interfere with the proceeds of the bill, till he was credited, or entitled to be credited, by them for the amount.

They employed as their agents, Coutts and Company, who employed Alexander and Company, who duly received payment from the acceptor, and having given Coutts and Company credit in account, five months afterwards became bankrupt. I conceive, my Lords, that under these circumstances, in point of law, this was payment to Ramsay and Company, and that they were bound to place the amount to the credit of Mackersy.

The general rule of law, that an agent is liable for a sub-agent employed by him, is not confined to cases where the principal has reason to suppose that the act may be done by the agent himself, without employing a sub-agent; and here I conceive, that the money is to be considered as received by Coutts and Company, whose correspondents actually received it at Calcutta, and credited them with the amount five months before their

failure. Mackersy could not have interfered with the money, either in the hands of Alexander and Company, or of Coutts and Company. There was no privity between him and either of those houses. But payment to Alexander and Company was payment to Coutts and Company, and payment to Coutts and Company was payment to Ramsay and Company, the respondents. I approve of the expression of the Lord Ordinary, "*at "that moment the law placed it to the credit of the defender.*"

The judges of the First Division truly say, that Ramsay and Company had not become the owners of the bill. If by *vis major* or *casus fortuitus*, the bill had been destroyed before it reached Calcutta, or if Clelland the drawer, had become insolvent before it was paid, the loss would not have been theirs. But they might, nevertheless, be agents to receive payment, and be liable for the amount when payment was received.

We have been much pressed with the case of Campbell *v.* the Bank of Scotland, decided by Lord Moncrieff, a judge for whose opinion I should entertain as much deference as for the opinion of any judge in Scotland or England, but the facts of the case are not distinctly stated. If he had decided that in a case like this, the bankers were not liable for the money received by their correspondents, I should have been bound to say, with all respect, that he had come to an erroneous conclusion.

I therefore move your Lordships, that the interlocutors of the First Division of the Court of Session complained of, be reversed, and that the interlocutor of the Lord Ordinary, assoilzieing the defender, with the costs, be affirmed.

Lord Cottenham. — My Lords, this case, though it does not appear to me to raise any question of difficulty, has acquired a considerable degree of importance from the manner in which the rule of law involved in it has been viewed in Scotland.

That rule of law is of general application, and I do not find any special circumstances in this case to take it out of the general

rule. The correspondence, if it proves any special contract, establishes only such an agreement as the law would have inferred from the dealings between the parties. The appellant having an open cash account with Messrs Ramsay, transmitted to them two bills drawn by himself upon Mr Clelland of Calcutta, and made payable to them. This is an authority to them to receive the money, which in the ordinary course of business, they proceeded to do, and the money was paid in pursuance of the order. From the time the bills were sent to the pursuers, the appellant did not interfere. It was not intended that he should do so; nor, indeed, could he have done so, as none of the intended agents acted under his authority: he therefore had no control over them; all that Mackersy undertook to do by the bills has been accomplished. His debtor in Calcutta has, as directed, paid the sum for which the bills were drawn. In the ordinary course of business, therefore, the bankers to whom he delivered the bills, and to whom they were payable, were bound to credit him with the amount received, and by these letters they in effect agreed to do so.

The money, indeed, was lost, not by any failure on the part of Mackersy, or of the party who had by the bills been ordered to pay the amount to the bankers, the drawers, but by the insolvency of the person in Calcutta, who had actually received the proceeds of the bills; and this loss the Court of Session has said is to fall upon the drawer.

The learned judges below do not altogether agree as to the ground upon which this judgment is founded. Lord Gillies thinks, that the contract of the bankers was to give the credit only upon getting the payment themselves, which, as such transactions are always matters of account, would never happen, if he means receipt of the identical sum paid by the acceptor. The Lord President, indeed, puts the case upon much the same ground, saying, that he could not hold that payment to Alexan-

der and Company, in Calcutta, was the same thing as payment to the pursuer in Edinburgh; but Lord Fullerton rather relies upon the admitted fact, that the bankers did not discount the bills, saying, that the result of the cases quoted, was, that unless there was some clear indication of intention of the parties, at the time, that the bills remitted should be taken by the bankers on discount, or terms equivalent to discount, they would be taken as remitted to, and taken by, the bankers as mere agents, and that he thought that there was no such indication in this case. And Lord Mackenzie says, the case turns upon this, that the bankers agreed to take the bills as payment in India; and the interlocutor of Lord Moncrieff, in Campbell *v.* the Royal Bank, upon which this decision now under consideration appears to be principally rested, draws a distinction between the cases which were cited, and the case before him, because, in that case, it must have been known that the agent could not himself have received the money.

Now, certainly, the present was not a case of discount, and there was no such special contract as is referred to by Lord Mackenzie, and it must have been known to the appellant, that Messrs Ramsay and Company could not themselves go to Calcutta, and receive the money. But none of these circumstances appear to me to be necessary in order to entitle the appellant to have credit with Messrs Ramsay, for the proceeds of those bills actually paid by his debtor, the acceptor of the bills. I cannot distinguish this case from the ordinary transactions between parties having accounts between them. If I send to my bankers a bill, or draft, upon another banker in London, I do not expect that they will themselves go, and receive the amount, and pay me the proceeds, but that they will send a clerk in the course of the day, to the clearing house, and settle the balances in which my bill or draft will form one item. If such clerk, instead of returning to the bankers with the balance, absconds with it, can my banker refuse to credit me with the amount of the bill or draft? If the bill had

been upon a person at York, the case would have been the same, although, instead of the bankers employing a clerk to receive the amount, they would probably employ their correspondent at York to do so, and if such correspondent received the amount, am I to be refused credit just because he afterwards became bankrupt, whilst in debt to my bankers? If the balance were in favour of my bankers, the question would not arise, so that my title to the credit would depend upon the state of the account between my bankers and their correspondent. The amount in money was received by the correspondent of my bankers at York, as between me and them it was received by them, and nothing which might subsequently take place could deprive me of the right to have credit with them for the amount.

If this be so in a transaction between London and York, it must be the same in one between Edinburgh and Calcutta, not by virtue of any special contract, but as resulting from the ordinary course of business, and in this case, from the letters which raised the undertaking to procure payment of the bill if it should be accepted and honoured, and to credit the proceeds. It was accepted and honoured, and the proceeds received by those employed for the purpose by them, and the appellant's title to credit for the amount was thereby perfected. If there were any negligence in the conduct of the parties actually employed to receive the money, it could only affect those by whom they were so immediately employed, for certainly they were not the agents of the appellant. Over them he had no control. The money received by Alexander and Company, properly formed an item in the account between them and Messrs Coutts and Company, their employers. If a larger balance had been due to them from Coutts and Company, than the amount of the money so received, they would have been entitled to claim the whole, as in fact they did retain part.

To solve the question in this case, it is not necessary to go

deeper than to refer to the maxim, *qui facit per alium facit per se.* Ramsay and Company agreed, for consideration, to apply for payment of the bill; they necessarily employed agents for that purpose, who received the amount; their receipt was, in law, a receipt by them, and subjected them to all the consequences. The appellant with whom they so agreed, cannot have any thing to do with the conduct of those whom they so employed, or with the state of the account between different parties engaged in this agency.

These principles and these consequences were so much and so properly felt, that they were scarcely disputed at the bar; but it was urged that the appellant had not put forward this case in the proceedings in such a manner as to entitle him to the benefit of it. I have for this purpose carefully examined the proceedings, and I think the objection is not well founded. The defence states the fact of the two bills having been paid to Alexander and Company, the agents of Coutts and Company, and the first plea in law raises the question, that, under the circumstances, Messrs Ramsay are liable for the money so received. There is far too much in the papers about negligence, but I think there is quite sufficient to raise the question, namely, the receipt by the agent being a receipt by the principal.

Lord Cockburn, the Lord Ordinary, appears to me to have taken a very correct view of the case, in saying, "both bills were "paid to persons empowered by the pursuer to receive payment; "at that moment the law placed them to the credit of the "defender."

On these grounds it appears to me, that the interlocutor of the Court should be reversed, and that of the Lord Ordinary substituted in its place.

Mr Graham. — Will your Lordships allow me to call your attention to the matter of costs? I presume it is your Lord-

ships intention, that the appellant should have the whole costs in the Court below.

Lord Campbell. — We ought to pronounce the judgment which ought to have been pronounced by the First Division of the Court.

Lord Brougham. — My Lords, I have no doubt about this, I shall take no part in the discussion on the merits, for I was not present at the argument, but I have no doubt that your Lordships feeling it right to reverse the interlocutor of the Inner House, and to affirm the interlocutor of the Lord Ordinary, the costs of the proceedings in the Inner House ought to be given. You never give the costs against a party coming to defend and protect a decree in his favour, therefore the appellant never gets his costs here; but in this case, we are putting ourselves into the place of the Court below, and giving those costs which the party ought to have had there. I think that is quite right.

Lord Cottenham. — We have affirmed the judgment of the Lord Ordinary, and the necessary effect of our so doing, is to give the costs of the hearing in the Court below.

Ordered and Adjudged, that the interlocutors complained of in the appeal be reversed; and that the interlocutor of the Lord Ordinary of the 21st December, 1839, (mentioned in the appeal,) be affirmed with costs.

WIRE & CHILD. — SPOTTISWOODE & ROBERTSON, Agents.

[*9th March*, 1843.]

MURDO MACKENZIE, ESQ., of Dundonell, *Appellant.*

ANDREW GIRVAN, Accountant in Edinburgh, *Respondent.*

Arbitration — Judicial Reference. — An award under a judicial reference, equally with a decree under an ordinary submission, is challengeable only upon the grounds allowed by the 25th article of the Act of Regulations, 1695, viz. corruption — bribery — or falsehood.

Ibid — Ibid. — The notes of a judicial referee being referred to in his award, are to be read as part of the award.

GIRVAN, the respondent, exposed lands to sale, under articles of roup, which provided, that in case any difference should arise between the parties, in regard to the import of the articles, the same was thereby submitted to the determination of the Dean of the Faculty of Advocates.

The appellant became the purchaser, but subsequently differed with the respondent in regard to the construction of one of the articles of roup, which was in these terms, — "The entry of the "purchaser shall be at Whitsunday, 1834, and he shall have "right to the year's rents, which are payable, the greater part, "at Martinmas, 1834; but, in consideration thereof, the price "shall bear interest, at the rate of four per cent, from Martin- "mas, 1833, the same being payable at Whitsunday, 1834, with "one-fifth part more of penalty in case of failure."

The entry of the tenants in the lands was a Whitsunday entry, a year's rent being payable at the Martinmas following. The appellant insisted, that under a correct construction of the articles of roup he was not bound to pay interest on his purchase money until Whitsunday, 1834, or, at all events, that he was entitled to so much of the rent which had been paid at Martin-

mas, 1833, as corresponded to the period between that term and Whitsunday, 1834, and that if this were not so, the articles had been falsely and fraudulently framed, with the view to impose on purchasers a belief that they would receive the rents for crop 1834, whereas, in truth, the respondent had, at Martinmas, 1833, drawn part of the rents for crop 1834; that payable at Martinmas, 1834, being, in truth, for part of crop 1835.

These questions were referred to the decision of the Dean of the Faculty of Advocates. The Dean issued notes expressing his opinion on the construction of the article in question, as adverse to the claim made by the appellant, and his readiness to sign a decree arbitral; but stating, that he would defer doing so, that the appellant might have an opportunity of Reducing the articles of roup, on the ground of fraud and misrepresentation alleged by him.

The appellant availed himself of the opportunity thus given, and brought an action against the respondent, which set forth that the articles of roup had been falsely and fraudulently framed, with a view to deceive purchasers into the belief, that at Martinmas, 1834, they would receive the rent for the crop of that year, as an equivalent for paying interest from Martinmas, 1833, whereas that rent had been paid to the exposer at Martinmas, 1833. The summons, therefore, concluded to have it declared, that the rents paid at Martinmas, 1833, were for crop 1834, and to have the articles of roup reduced, and the respondent decerned to pay to the appellant the rents which had been drawn by the respondent at Martinmas, 1833, or, otherwise, to give up the claim for interest on the purchase money.

After the record had been prepared in this action, and an issue adjusted for trial by jury, the counsel for the parties agreed to a judicial reference in these terms: — "Instead of proceeding to "have the said cause tried by a jury, the parties have agreed, "and now hereby judicially agree, to refer the said issue, and

" the whole conclusions of the action, to Richard M'Kenzie, " Esq., writer to the signet, with power to him to hear parties " thereon, to take all manner of probation he may consider " necessary, or which would have been competent if the said " issue had been tried by a jury, and thereafter to bring the said " action to a conclusion; as also to determine all questions of " expenses in the same manner, and as freely, in every respect, " as if the same had been left to the determination of the Court. " It was therefore craved that their Lordships would interpone " their authority to this minute."

The judicial referee allowed the parties to lead evidence, and after the proof was concluded, issued notes of his opinion, in which occurred the following passages: — " The Dean of " Faculty, to whom all questions 'regarding the import of " 'these articles, or any matter connected with the sale and " 'final completion of the bargain' was referred, appears to " have been very decided in his opinion that there was no " ambiguity in the articles of sale;" and again, " The arbiter " holds himself to be bound by the opinion of the Dean of " Faculty upon the articles of roup, and the arbiter may at " the same time state, that although he might have felt some " difficulty as to the construction of the original articles, he " conceives, that the only construction to be put upon the " additional articles, which, in so far as regarded the term of " entry, superseded the original articles, is that contended for " by the defender, (*respondent*,) and upon which he has obtained " a favourable opinion from the Dean of Faculty."

After issuing these notes, the referee delivered the following award: — " In consequence of the foregoing minute of reference, " and of the interlocutor of the Second Division of the Court, " the referee has repeatedly considered the proceedings and " productions in the process; and having subsequently heard the " examination of witnesses for the parties in support of their

" respective pleas, and thereafter heard their counsel at full " length on the proof and on the whole cause; having issued full " notes of his opinion to the parties, and put it in their power " to be heard by their counsel relative to those notes; and " having now farther considered a protest and note for the pur- " suer, and advised the whole proceedings in the reference, and " had many meetings with the agents for the parties, the referee " finds that the pursuer has altogether failed to establish any " thing approaching to falsehood or fraud against the defender, " and therefore sustains the defences, assoilzies the defender " from the conclusions of the action, and finds him entitled to " expenses both in the proceedings before the Court and in the " reference, and approves of the auditor's report, whereby the " account of the defender's expenses is taxed to the sum of " L.453, 0s. 5d.; also finds the defender entitled to the expenses " of the present discussion, modifies the same to L.10, 10s.; " allows decree to go out and be extracted in name of " William Alexander, W.S., the defender's agent, for both " sums of expenses, and decerns."

On the 19th December, 1840, the respondent moved the Court to pronounce an interlocutor in conformity with the award. The appellant unsuccessfully opposed this motion on the grounds upon which he argued the appeal, but the Court refused to disturb the award, and pronounced an interlocutor in exact conformity with it, *mutatis mutandis*.

The appeal was taken against this interlocutor.

Mr Pemberton Leigh and Mr Gordon for the appellant. — I. The notes of the referee being specially referred to in his award, they form part of, and are to be read along with it, Keith *v.* Elstob, 3 *East*, 13.

II. It was the object of the parties by the reference, to obtain the opinion of the referee in regard to all the matters referred. The reference embraced, among other things, the construction of the articles of roup. But the award is confined to fraud and misrepresentation alone, and the notes issued by the referee shew, that on the question of construction the referee held himself to be bound by the opinion which the Dean of Faculty had delivered. The parties, therefore, had only the opinion of the Dean, not of the referee. It may be said, that the referee has in some sort expressed his own opinion on the construction, but it is evident, that so far as he formed such opinion, it was not the result of his own unbiassed judgment, but was influenced and directed by that given by the Dean. The parties had not then what they bargained for in the reference, the unfettered opinion of the referee. This is an objection sufficient for setting aside the award, upon the principles which were recognized in Sharpe *v.* Bickerdyke, 3 *Dow*, 102; Bailie *v.* Gas Light Company, 2 *Sh.* and *M'L.* 243; Heggie *v.* Stark, 3 *Sh.* and *D.* 488; Glennie *v.* M'Phail, 3 *S.* and *D.* 574; M'Pherson *v.* Ross, 9 *S.* and *D.* 797; Langmuir *v.* Sloan, 2 *D. B.* and *M.* 877; *Ersk.* IV. 3. 35, *note* 192. These authorities establish that reduction of decrees arbitral is not confined to the grounds specified in the act of regulations, 2d November, 1695, c. 25, but will be given where justice palpably has not been done, or has not been done in the way contemplated by the reference.

III. The Act of Regulations applies in terms only to "signed "submissions," but a judicial reference is not such. A submission, unless it expressly bind the heir, falls by the death of the party; whereas a judicial reference still subsists. Upon the decree under a submission, diligence can at once be done by the mere operation of registering the submission and decree; whereas no force can be given to an award under a judicial reference, but

by the decree of the Court. The counsel in the cause may have an implied mandate to sign the reference, and so to bind his client, but the matter is not thereby withdrawn from the control of the Court, otherwise the counsel would exceed his mandate, as it is to obtain the opinion of the Court alone that he holds his mandate. The finding of the referee, therefore, is no more than a judicial report on which the Court may exercise its judgment as to whether the conclusions it comes to have been properly arrived at, and this irrespective of the Act of Regulations; Glennie *v.* M'Phail, *ut supra;* Clyne's Trustees *v.* Gas Light Company, *ut supra;* Baxter *v.* M'Arthur, 14 *D. B.* and *M.* 549; Taylor *v.* Burns, 1 *D. B.* and *M.* 743.

Mr Rutherfurd and Mr Forbes were of counsel for the respondent.

The answer of the respondent to the case made by the appellant is so fully met in what fell from the Peers who delivered judgment, that it is not necessary to repeat it here. The authorities relied on were, act 1672, cap. 16; act 1693, cap. act of sederunt, April 29th, 1695, art. 25th; *Ersk.* IV. 3. 35; Morison *v.* Robertson, 1 *Wil.* and *Sh.* 143; Anderson *v.* Kinloch, 14 *D. B.* and *M.* 447; Alston *v.* Chappel, 2 *D. B.* and *M.* (*N. S.*) 248.

LORD BROUGHAM. — My Lords, if your Lordships should come to the same conclusion, as that to which I have arrived upon this case, you will have very little doubt upon either of the two main points that have been made; perhaps it is unnecessary, and my noble and learned friends near me take that view of it, to enter into the discussion of the very important point respecting the application of the 25th article of the Act of Sederunt 1695, which we are clearly of opinion has statutory force, and is as binding as a statute; power having been delegated to

the Court by the legislature to make the Act of Sederunt, and the act having afterwards been adopted by the legislature. With respect to that, perhaps it was not necessary to enter into that question; but I should be very unwilling to have it doubted, because it is a most important branch of the law; and my noble and learned friends near me, and myself have felt, from the moment that we rightly apprehended the merits of the argument, we really had no doubt about it, that the law is as it is contended for on the part of the respondent, that in an action to reduce a decreet-arbitral, or in an action to suspend a charge given upon a decreet-arbitral, the extrajudicial decreet-arbitral most undoubtedly is binding by the express terms of the Act, unless in the excepted cases.

Then, my Lords, I can see no difference between an award and a decreet-arbitral, that is to say, between that which takes place upon a voluntary or extrajudicial submission, and that which takes place upon a judicial reference. I can see no difference between the two, in point of principle; the only difference is in the modes of proceeding. In the one case, it is not necessary for the party in favour of whom the award is pronounced, to proceed at all, he waits till the other party against whom the award is pronounced, proceeds. I cannot draw any distinction between an award and a decreet-arbitral, they are convertible terms. In the case of an extrajudicial award, it is not necessary for the party in favour of whom it is made to proceed at all — it is for the other party against whom it is made to reduce it, or to suspend any charge given upon it — that is to say, any step taken for obtaining execution upon it. But in the other case, (and that is the only difference that I can perceive in the law,) where it is a judicial reference, something must be done by the party in favour of whom the award is made, in order to obtain the fruits of that award. And he applies to the Court to do what? To interpose its authority.

I think therefore, my Lords, that it would be one of the greatest departures from all principle, in the construction of that Act, a construction having been given in Scotland, totally different from the construction here given in England to a similar statute passed about the same time, the act of King William, if the award could be impreached. Ever since the passing of those nearly contemporaneous Acts, the Act of King William, and the Act of Sederunt, which has the force of a statute in Scotland, which is in the same reign, and nearly about the same time, the laws of the two countries may be said to have diverged. The laws being very different in point of language, as very often happens, different views have been taken by the Courts in applying and construing them, and accordingly in Scotland, with respect to what they call a voluntary submission, or an extrajudicial submission, they have taken a view most clearly different from the view taken by the English Courts. And why, I may ask, should they not have had the same difference in their view of a judicial submission? I see no reason for supposing that they should not. No authority has been cited at all sufficient to shake my opinion upon that. On the contrary, I should say, that the current of authority and the practice are consistent with the reason of the thing, and, therefore, I, for my own part, do really entertain no doubt upon it, and I should think it very unfortunate, if, in the discussion of this case, much more important than the value of the case twenty times over, this should be drawn into question. My noble and learned friends entertain no doubt whatever upon the subject.

Now, my Lords, the other point is with respect to the reference; but upon the whole, I really do not see any reason to quarrel with that reference. The first point will put an end to the case; but construing the additional article with reference to the first, I can see no reason for quarrelling with the judgment, I think that it has not miscarried, I think that it is right, and,

therefore, I now am prepared to move your Lordships upon these grounds, and there is no doubt upon the first point, that the interlocutor complained of be affirmed, and the appeal dismissed with costs.

Lord Cottenham. — My Lords, I am entirely of the same opinion with my noble and learned friend. Considering this case with reference to the distinction taken between a decreet-arbitral, and a minute of reference, if it were necessary to give an opinion upon that subject, I certainly should say that I have heard nothing which raised any reason to suppose, that the courts in Scotland have made any distinction between the one proceeding and the other for this purpose, as to the right of the Court to review the proceedings of the referee. But it appears to me, that the facts of this case having been entered into, it is not necessary to give any farther opinion upon that subject; it must be more satisfactory to the party, that the opinion of any Court, and particularly of this House, should be exercised upon the merits of the case, rather than upon a mere matter of form which may go to exclude the discussion of those merits.

Now, if we are at liberty to look into the case as it was before the referee, the question turned upon the construction put by him upon the articles, the last article being the one on which the question arises. That "he or they shall have right to the year's rents which are payable, the greater part at Martinmas, 1834, but in consideration thereof, the price or prices shall bear interest from Martinmas, 1833." The party says, this was the representation, that I should have the whole of the rents during the year 1834; because I am called upon to pay interest from the preceding Martinmas, therefore I ought to have, and it is contained in the articles that I should have, the rents in the same period. And no doubt the language is not very happily selected to exclude doubt or uncertainty; but the only way in which I can construe these words, consistent with grammar, is,

that you are to have the rents which are payable at Martinmas, 1834, which is a great part of the rent, and which is consistent with the facts. It is impossible to make sense of the terms used in any other manner, there being no question as to setting aside the sale on the ground of these rents not having been received, but merely on the question of the construction of the articles. If I am to put a construction upon those articles, that appears to me to be the most reasonable, proper regard being had to the expressions used.

But then, it is said, that the referee did not exercise his judgment upon it, because of the Dean of Faculty having previously given an opinion upon the construction of the articles, and that he considered that he was bound by that opinion. There are such expressions to be found in the notes, but the notes go on to say, that upon his view of the articles, he could not put any other construction upon them.

If it had rested upon the award itself, without reference to the notes, another objection would have arisen, namely, that the award professes to proceed entirely upon the submission of the law, and that being negatived, he was wrong in the conclusion he has come to as expressed upon the award. That at one time struck me, because, upon the face of the award itself, the case seems to be put entirely as a matter of law, whereas that was not the whole matter in the suit, and therefore not the whole matter submitted to the referee. But the notes are very properly referred to here, because they are referred to by the award itself, and when you refer to the notes, you find that that is not the whole case upon which the referee exercised his judgment, — that he had also taken into consideration the construction of the articles upon which the question of the amount of the rent would depend. And therefore, my Lords, I am of opinion that that objection, which at first appeared strong upon the face of the award itself, cannot interfere with the judgment of the Court below.

For these reasons, I am of opinion that the judgment of the Court below is right, and ought to be affirmed.

Lord Campbell. — My Lords, I am extremely glad to find, that according to the opinion of my noble and learned friend, who has last addressed you, in which I concur, justice has been done between these parties by the arbitrator: but I must confess, my Lords, that I should be without any difficulty prepared to affirm this interlocutor, without at all looking to the merits of the case, because it seems to me, that neither the Court of Session, nor this House, can look to see whether the arbitrator came to a right conclusion in point of law, as both the law and the fact were referred to him by both parties; and if he has acted within his jurisdiction, has not exceeded his jurisdiction, and has exhausted all that was submitted to him, and has not been guilty of any misconduct, the award that he has pronounced is binding, both in point of law and in point of fact, by the Act of Sederunt referred to, which clearly has the force of an Act of Parliament.

Now, my Lords, let us see what the submission really is, and whether it is such a submission as is referred to in the Act of Sederunt. We have the submission subscribed by the advocates on each side according to their mandate, which, I apprehend, clearly, authorizes them to agree to such a submission. It has often been decided in England, that parties are bound by a reference signed by their counsel, or by their attornies, and I apprehend that there can be no doubt, that counsel, by the law of Scotland, have the same power. Now here is a contract which amounts to a submission, a contract subscribed by the counsel on both sides. (His Lordship here read the terms of the reference.) Therefore, my Lords, it is not to be left to the determination of the Court, — it is to be left to the determination of the arbitrator, — he is to make a final end of all the controversies which are submitted to him.

Then, when he makes his report, is not that a decreet-arbi-

tral? That is the decree which he pronounces as arbitrator, and which was intended to be final between the parties, and to make an end of all disputes. I humbly apprehend, therefore, my Lords, that this is a submission within the meaning of the Act of Sederunt.

If that be so, it can only be impeached upon the ground of corruption, bribery, or falsehood. Well, now, what is there to impeach this award? There is no misconduct imputed to the arbitrator, — there is no bribery, — there is no falsehood, — and the only ground upon which the award is sought to be impeached is this, that the arbitrator, first, has not exhausted all which was submitted to him, and, secondly, that he has misconstrued the law. Now, looking merely to the report dated 7th December, 1840, I should say, that that was liable to the objection which so much in the first instance, struck my noble and learned friend who sits near to me, (*Lord Cottenham.*) If the arbitrator had said, he "finds that the pursuer has altogether failed to establish any thing approaching to falsehood or fraud against the defender, and therefore sustains the defences, and assoilzes the defender from the conclusion of the action," it would appear that he had not exhausted all, that he had not looked at all the conclusions of the summons. But, my Lords, he refers to those notes: he says, "having issued full notes of his opinion to the "parties," therefore the notes form part of the award, and coupling the notes with the award, it seems to me that he has fully exhausted all the conclusions of the summons, and that there is no part of the matter which was submitted to him, upon which he has not deliberately adjudicated.

Then, if that be so, the question arises whether you can impeach his award because he has fallen into a mistake in point of law, and put a wrong construction upon the articles. I am of opinion, my Lords, that if it were proved that he had made a mistake in law, it would be no ground at all for impeaching his

award. It seems to me, my Lords, that the practice of Scotland is much more convenient than the practice here, and that we ought by no means to disturb it. The parties select a judge on whom they place confidence as to his legal qualifications, and as to his capacity to decide facts, and they think that he will dispose of the matter more satisfactorily than the regular tribunals of the country, more economically perhaps, and more expeditiously, — and that there may be no appeal to the Inner House, or to the House of Lords, they therefore select him as their judge, and his judgment is to be final.

My Lords, the practice which has prevailed in England, has produced very great inconvenience. The construction put upon the Act of Parliament in this country certainly is, that if it appears upon the face of the award, or in the papers referred to in the award, that the arbitrator has mistaken the law, the Court has jurisdiction over the award, and will set it aside. That has produced so much inconvenience in this country, that for a number of years past in Westminster Hall, they have said that they would not at all review what the arbritrator had done, if it was referred to a barrister-at-law — a gentleman in the law; but that whatever he decided, whether right or wrong, should be final between the parties.

Lord Brougham. — That was upon the ground, they always said, that the law was referred to him.

Lord Campbell. — It does not, I think, rest upon that principle. The practice that has prevailed in Scotland, of considering a decreet-arbrital, or an award as conclusive, both as to law and fact, seems to me to be much more reasonable, and I should be very sorry if any thing occurred in this case at all to shake the principles upon which those cases are decided.

Now, my Lords, I believe no case has occurred, either in the Court of Session, or in this House, which has proceeded upon different principles; they will all be found, when examined, to

resolve themselves into this, either that there has been misconduct in the arbitrator, or that the arbitrator has exceeded his jurisdiction, or that he has not exhausted all that was referred to him. That case of Clyne, which was decided by my noble and learned friend who is now on the woolsack, (*Lord Brougham,*) certainly proceeded on the ground, not of mere mistake in point of law, but that there was a clear excess of jurisdiction.

Lord Brougham. — He mistook his jurisdiction, — that is a mistake in point of law which is fatal.

Lord Campbell. — Where there is an excess of the jurisdiction confided to the arbiter, then the award is bad, and may be set aside; but if he acts within his jurisdiction, and exhausts all that is referred to him, then I think the Court has no power to correct what he has decided according to law and justice.

For these reasons, my Lords, I am of opinion that the interlocutor appealed against ought to be affirmed with costs.

Ordered and Adjudged, that the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed with costs.

RICHARDSON and CONNELL — HAY and LAW, Agents.

[23*d March*, 1843.]

JAMES WALKER, late Tenant in Bellfield, now residing in Dundee, *Appellant.*

WILLIAM WEDDERSPOON, Writer in Perth, and others, *Respondents.*

Assignation. — Title to sue — Costs. — If the cedent of a debt assigned in security sue the debtor in his own name, the Court may order him to find security for costs.

Appeal. — Costs. — Costs at dismissing an appeal not given, because the appeal had been brought with leave of the Court below.

WALKER having alleged claims against Wedderspoon, for his actings as trustee on the sequestrated estate of Kelty, presented a petition and complaint against Wedderspoon, on the ground of misconduct. The Court held, that this proceeding was incompetent, by reason that the creditors on Kelty's estate had, by formal resolution, approved of Wedderspoon's whole conduct and management, but they reserved right to Walker to bring a reduction of the resolution. Walker accordingly brought a reduction of the resolution. After the action had been somewhat proceeded in, Walker applied for and obtained the benefit of the poor's roll for its farther prosecution.

Previous to the adoption of these proceedings, Walker had assigned to Rutherfurd his claims against Wedderspoon, in security of a debt of L.343, afterwards increased to L.533, by advances for the purpose of enabling Walker to carry on the action of reduction. By the terms of the deed, Rutherfurd was taken

bound to account with Walker for whatever he might recover under the assignation exceeding the debt in respect of which the assignation was made.

Wedderspoon met the action of reduction by a preliminary defence, that Walker had no interest to sue, by reason of the assignation to Rutherfurd, who, as was shewn by his advances to Walker, was in truth the pursuer of the action.

Walker answered, that his claims against Wedderspoon amounted to L.2390, while the debt for which the assignation had been made amounted only to L.533, which had lately been greatly reduced; that he therefore had the substantial interest in the claims, as Rutherfurd was bound to account to him for what he might receive exceeding his debt, and therefore he, Walker, was entitled by himself to sue the reduction.

The Lord Ordinary, on the 11th January, 1838, pronounced this interlocutor. "In respect it appears that the pursuer has "transferred his whole interest in the action to a third party, and "that the assignee declines to appear and sist himself so as to "render himself liable for costs, while the letter produced by him "in no respect affords any guarantee to the defender for his costs, "if the suit against him is unsuccessful, finds that the pursuer must "find caution for costs before this action proceeds."

Walker then produced a deed of retrocession by Rutherfurd, and insisted on his right now to proceed with the action.

The Court, on 11th June, 1839, found "that the cause cannot "proceed farther, until payment of the expenses incurred by the "defender in the preliminary discussion, occasioned by the con- "cealment of Rutherfurd's interest, as truly the party for whose "behoof this action was insisted in, and that the defender is not "now entitled to insist that caution shall be found for any "future expense."

The appeal was brought against this interlocutor, with the leave of the Court below, after leave had once been refused.

WALKER *v.* WEDDERSPOON. — 23d March, 1843.

Mr Shebbeare for the appellant, cited Fraser *v.* Dunbar, 6th June, 1839, 11 *Jurist*, p. 500.

Mr Anderson for the respondent, was not called on.

LORD CAMPBELL. — My Lords, I am quite clear that this interlocutor ought to be affirmed. The interlocutor chiefly complained of is that of 11th January, 1838.

Now the only objection the appellant makes is, that the assignment is not absolute, that it is only in security. Therefore, the doctrine laid down and contended for is, that wherever there is an assignment in security — not out and out — the Court has no discretion at all to interfere and order security for costs, although substantially the action is brought in the name of a pauper, for the benefit of another person. The Court of Session seems to me clearly to have this jurisdiction, and I think no Court can effectually discharge its duty, and do justice to the suitors, without having such a power. The case cited by Mr Shebbeare goes no farther than to shew that it is matter of discretion. It would be extremely inconvenient if, when the Court acts in the exercise of a discretionary power, there were to be an appeal to this House. I think Lord Cunninghame was fully justified in making the order, and I entirely approve of it. The same attention will certainly be paid to this appellant as if he had been a person of the highest rank in the land; but it appears to me that this is an appeal which ought never to have been brought, and I very much regret that it has been brought here.

Lord Brougham. — My Lords, I quite agree with my noble and learned friend. There is, no doubt, a distinction for some purposes, between an assignment out and out, and an assignment in security for a debt. But observe this, — suppose the debt amounts to the value of the property assigned in security, it does not signify one farthing whether it is assigned in security, or whether it is assigned out and out, for the equity of redemption

is not worth a farthing in that case. However, it is not necessary to say any thing about that.

Lord Campbell. — Can you inform us, Mr Anderson, how it happened that the Court gave leave to appeal in this case?

Mr Anderson. — I believe it was in this way, — that at first the Inner House refused the petition for leave to appeal. After this the appellant moved the Lord Ordinary to assoilzie the respondents. The Lord Ordinary reported this motion to the Inner House, who were equally divided, and left the Lord Ordinary to dispose of the motion himself, which he did by refusing the motion. After this the appellant presented a new petition for leave to appeal.

Lord Campbell. — I should like to know what was the question of law which the Judges wished to have reviewed.

Mr Shebbeare. — I apprehend it was, whether, under these circumstances, the inference of law was to be drawn which I have submitted to your Lordships.

Lord Cottenham. — After the first interlocutor had been the subject of a reclaiming note, and had been abandoned by the party, and a different course adopted with respect to the rest of the litigation, the party gets leave to appeal against the original interlocutor.

Lord Brougham. — I wish the Court had not given leave. I do not understand why they gave it.

Lord Campbell. — The only difficulty I feel in this case is respecting the costs. If it had not been that leave was given under the extraordinary circumstances to appeal to this House, I should have had no difficulty in affirming the interlocutor with costs. I regret exceedingly that the learned Judges were not more firm, and did not adhere to their original order, whereby they refused leave. I know that Courts have always a great inclination to allow their decisions to be reviewed, but that ought to be where there is a point of law of importance which is doubt-

ful, and which ought to be settled by a superior tribunal. I am here at a great loss to conceive what point of law their Lordships conceived ought to be brought before the consideration of the House of Lords, and in respect of which they rather seem to have encouraged the appeal, by causing it to be supposed that there was some question fit to be considered by this House. I think the interlocutor should be affirmed without costs.

Lord Cottenham. — I am of the same opinion. If the party had appealed without leave, I should have thought the appeal ought to be dismissed with costs.

Lord Brougham. — If there had been no such leave obtained, but it had been an ordinary proceeding by the party, without leave of the Court, the interlocutor ought to have been affirmed with costs. It is very hard upon the respondent, and I cannot help feeling that it is no benefit to the appellant. On the contrary, it is very injurious to him. Any little remnant of property that he might have had has probably been exhausted by this injudicious course that has been taken. If we do not give costs it is simply in consequence of the Court having given leave.

Mr Anderson. — In all cases of appeals from interlocutory judgments leave must be had, and I do not think your Lordships have ever drawn the distinction when you have dismissed the appeal, of not giving the respondent costs because leave had been given to appeal.

Lord Brougham. — Each case stands on its own grounds. There may be a case where leave may be properly granted, and yet that would be no reason for not giving costs.

Mr Anderson. — That is making the respondent pay for the error of the Court.

Lord Brougham. — That parties constantly do. When you move for a new trial on the ground of the misdirection of the Judge, the costs are not given.

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Lord Campbell. — I hope it will be understood below, that costs were refused entirely because this House is of opinion that the Court ought not to have given leave to appeal.

Lord Cottenham. — When a case is brought here in pursuance of leave given by the Court, it encourages the party to go on, when probably he would not otherwise have done so.

Mr Anderson. — We resisted the application for leave.

Ordered and Adjudged, that the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed.

DUNN and DOBIE — DEANS, DUNLOP, and HOPE, Agents.

[Judgment, 6*th April*, 1843.]

MRS MARGARET FISHER, and DANIEL FISHER, her Husband, *Appellants.*

WILLIAM DIXON and Others, *Respondents.*

Personal Succession. — *Legitim.* — *Parent.* — Acceptance by a child, after the death of the father, of a provision given by the father in satisfaction of *legitim*, enures to the benefit of the father's general disponee, and not of the other children.

IN 1822, Dixon, the testator in the cause, died, leaving a widow and two sons, John and William, and four daughters, Mrs Mann, Mrs Fisher, Mrs Whitehead, and Miss Lilias Dixon.

The widow accepted the provisions given her by her husband instead of her *jus relictæ.*

The testator had, in the contract of marriage of his daughter, Mrs Whitehead, bound himself to pay her L.2000 within five years, "and that in full satisfaction to the said Janet Dixon and "her intended husband, of her patrimony, and of all that they, "or either of them, can or might ask or demand of the said "William Dixon, her father, or his representatives, through his "decease, in any other manner of way whatever, excepting what "he may hereafter think proper to bestow of his own good will "only."

In April, 1817, the testator executed a general disposition of his whole means and estate in favour of his two sons, under burden of payment of his debts, and such legacies as might be bequeathed by him. By this deed the testator directed his sons, whom he thereby constituted his sole executors, to pay to each of his daughters L.2000, to bear interest from the date of his death,

but not to be payable till two years thereafter; the L.2000 being payable to Mrs Whitehead in terms of her contract of marriage. This disposition contained a declaration that the L.2000 should be enjoyed by the daughters, free from the power of their husbands, in liferent, and their children in fee; and another in these terms: — "And I hereby declare, that the provisions above "mentioned shall be in full to each of my daughters, their "husbands, children, or assignees, of all that they could ask or "claim in or through my decease, legally or conventionally, or "any other manner of way."

In March, 1820, the testator executed another deed, giving an additional sum of L.2000 to each of his daughters on the same terms as the first.

Mrs Fisher refused in the meanwhile to accept the provisions given her by her father, and, with the view of ascertaining whether she should betake herself to these, or to her right to *legitim*, she, in May, 1823, raised an action of multiplepoinding, in the names of her brothers John and William, against herself and the other members of the family; and in 1826, she likewise brought an action of count and reckoning and payment.

The sons accepted of the general disposition in their favour, and entered into possession of the estates left by the testator, which consisted of property, both real and personal, without any collation of the real estate being made by John, who was the testator's heir-at-law.

Subsequently, in 1827, after having carried on the business of their father as an iron master and coal miner, William purchased from John his whole interest in the testator's estate at the price of L.35,000.

Mrs Mann and Miss Dixon agreed to accept the L.4000 given them by their father's settlements, and to receive from the brothers, "in addition to the provisions made by the deed of "settlement," a sum of L.1000.

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In 1830, with the view of confirming the sale by John to William, and relieving John of his liability to pay these sums, after having parted with the estate to William, Mrs Whitehead and Miss Dixon joined the widow in executing a deed, which, after reciting the different provisions made by the testator in their favour, and that they had ratified his said settlement, "of which "provisions we accordingly accepted, and declared ourselves "satisfied therewith," they released and discharged John Dixon "of and from all claims and demands of every description com- "petent to us, or any of us, under the said disposition and "settlement, reserving to us our claims against the said William "Dixon for the said provisions in our favour, which shall in no "way be hurt by the granting of these presents."

In 1831, Mrs Mann and her children executed a deed, whereby, upon the recital that the provision given them by the testator had been paid, and settled upon trust for their behoof, they discharged John and William Dixon, as disponees and executors of the testator, of the provision, and declared, that they accepted it "in full of all claims competent to us, or any of us, of "*legitim*, portion natural, bairns' part of gear, or other claim, "legal or conventional, by, and in consequence of, the decease "of" the testator.

In 1835, Mrs Fisher declared her intention to reject her testamentary provision, and claim her *legitim*.

In 1836, William Dixon lodged in the multiplepoinding, (which up to this time had been in dependence, but had been little proceeded in,) claims in the name of Mrs Whitehead, Mrs Mann, Miss Dixon, and himself, for their respective shares of *legitim*.

In the course of the proceedings which followed upon these claims, William Dixon produced deeds executed by Mrs Mann and Miss Dixon in 1837, which set out, that the deeds executed by Mrs Whitehead and Miss Dixon in 1830, and by Mrs Mann

and her children in 1831, and what occurred previously to the execution of these deeds, was merely the carrying out of an arrangement between them and him as to payment of their *legitim*, in regard to which they retained their right, but accepted him as their debtor, and renounced all claim against their brother John, his co-disponee. Upon this recital the deed confirmed the testator's settlement, so far as it conveyed the granters' shares of the *legitim* fund to the general disponees, and conveyed to William the whole sums claimable by the granters on the death of their father, in name of *legitim*, portion natural, bairns' part of gear, or otherwise.

For the purpose for which the case is reported, however, it may be assumed, as, indeed, was not much disputed at the hearing of the appeal, and as the House appeared to hold, that Mrs Mann, Mrs Whitehead, and Miss Dixon did, after their father's death, accept the provisions given them by his several deeds, as in satisfaction of their claim for *legitim*.

In this state of matters, Mrs Fisher insisted that she alone was entitled to the whole *legitim* fund, 1st, Because John did not propose to collate the heritage, and made no claim; 2d, Because William held a general conveyance to a share of the heritage and moveables, and refused to collate that share; 3d, Because Mrs Whitehead had, by her marriage contract, accepted from the testator a sum in full of her *legitim*; 4th, Because Mrs Mann and Miss Dixon had accepted of the provisions given them by the testator, in full of their *legitim*.

On the other hand, William Dixon insisted that the provisions accepted by Mrs Whitehead, Mrs Mann, and Miss Dixon, in full of their legal provisions, fell to be held as paid out of the *legitim* fund; that in accounting for that fund with Mrs Fisher, he was entitled to deduct the amount of these provisions to the extent to which the share of each of the parties in the *legitim* would amount; or, at all events, that Mrs Fisher was entitled

only to one-fourth part of the *legitim* fund, and that the remaining three-fourths belonged of right to him, two-fourths as in right of Mrs Mann and Miss Dixon, and one-fourth as in his own right.

The Lord Ordinary (*Moncrieff*) ordered cases by the parties, which he reported to the Court. The Court, after hearing counsel, ordered additional cases on the following questions: — "A father having died leaving a disposition and settlement in "favour of a general disponee, burdened with certain provisions "to his other children, declared to be in satisfaction of *legitim*, what "is the effect of a child accepting such voluntary provision after "the father's death? Does it operate to increase the share of "another child who repudiates the settlement, and betakes him-"self to his legal right of *legitim*, or does it operate in favour of "the general disponee?" and ordered the cases to be laid before the other Judges for their opinion.

On the 16th of June, 1840, the Court, in conformity with the opinion of a majority (of five to four) of the consulted Judges, which will be found in 2 *D. B.* and *M.* 1121, pronounced the following interlocutor: — "In respect of these opinions, "find, with reference to the question put to the consulted "Judges, that the acceptance by a younger child after the "father's death, of a voluntary provision made by the father "in favour of such child, as in satisfaction of the claim of "*legitim*, operates in favour of the general disponee, and not so "as to increase the share of another child who repudiates the "settlement, and betakes himself to his legal right of *legitim*."

The appeal was taken against this interlocutor.

Mr Pemberton Leigh, and Mr Sandford, for the appellants. — The judgment of the Court below is rested upon a distinction taken between acceptance of provisions in the life of the father,

and such acceptance after his death, and is in principle based on the assumption, that the general disponee of the father is debtor to the children for their shares of the *legitim*. The children are not creditors but proprietors. During the life of the father they are members of the partnership of marriage; and though he has the right of administration, their right of property is not the less existent, as is shewn by the effect of his becoming ill of the disease of which he dies, which is to deprive him of the right of administration; and even before that event happens, the father cannot, by testament or revocable deed, dispose of the *legitim*, *Ersk.* III. 9, 16. The general disponee of the father, therefore, is merely a trustee for division of the *legitim* among the children entitled to it. He cannot derive any title of property to himself from the father, as the father has no power to give it, or affect the fund in any way.

The right of the children is not as individuals, but as a class, and is to the whole as an *unum quod*. If any of the class have discharged or renounced their right to a share in the division among the class, by any agreement with the father, the right of such child is extinguished, and the fund remains, unaffected by any such agreement, for division among those who have retained their right. Martin *v.* Agnew, *Mor.* 8168.

This is admitted in regard to any agreement with the father in his lifetime, but is denied if the agreement be after the father's death. There is no trace in the institutional writers, however, of any such distinction. The decision in Hog *v.* Lashley, *Mor.* 8193, is opposed to any such notion; and the decision in M'Gill *v.* Oxenfoord, *Mor.* 8179, is a direct authority, that acceptance after the death of the father, of provisions given by him, does not make the share of *legitim* of the child so accepting, go to the father's general disponee; for the acceptance in that case was not in the lifetime of the father, as supposed by the Court below, but after his death, as was shewn to the Court by documents pro-

duced after its judgment had been pronounced, and as indeed appears from a proper reading of *Lord Stair's* report of the case. Henderson *v.* Henderson, *Mor.* 8199, in some degree countenances the claim of the respondent, but the report of that case is very imperfect, and has never been recognized as law; on the contrary, it was expressly overruled in the case of Andrews *v.* Sawers, 14 *S.* and *D.* 593. As to Robertson *v.* M'Vean, decided 16th January, 1813, but not reported, it is no authority for the present case, as the question there raised and decided was, whether an only younger child being residuary legatee, had a right to *legitim*, or whether the whole went to the eldest child, and heir-at-law.

Mr Solicitor-General and Mr Gordon for the respondents. — Both the *legitim* and the *jus relictæ* remain part of the father's estate after his death, and may, in certain circumstances, be effectually conveyed away by him, Collier *v.* Collier, 11 *S.* and *D.* 912. No doubt, the widow and children may follow their shares of the estate into the hands of the disponee, but in the case of children, if there be only one, and he accept provisions from the father in discharge of the *legitim*, the whole fund would go to the disponee, as would also be the case if there were more than one child, and they all accepted provisions. But it is said, if one out of several children do not accept the provisions, the case is different, and this child takes the whole *legitim* against the disponee. Though this may be true where the acceptance is in the life of the father, it is not so where the acceptance is after his death. On the father's death the child's right vests; and it is competent for him to bind it in any way he chooses, in favour of the disponee or otherwise. The law, under the custom of the cities of London and York, is the same in regard to this matter as the law of Scotland; and in Morris *v.* Burrows, 2 *Atk.* 627, this very point was decided. The Scotch authorities are to

the same effect. In Henderson *v.* Henderson, *Mor.* 8189, two out of three daughters had accepted provisions from their father: one of them after the father's death renounced her *legitim*, and it was held, that " by her ratification and renunciation, she " had communicated her share of the *legitim* to her brother," who was the father's general disponee. In Robertson *v.* M'Vean, 16th January, 1813, an unreported case, *vide post.* p. 87, it was held that the whole *legitim* fund did not go to one of two children who repudiated a provision by the father — the other accepting the provision. No doubt, in Andrews *v.* Sawer, 2d March, 1836, it was held, that acceptance by a widow of her *jus relictæ*, after the death of the husband, would create a bipartite division of the husband's estate, and so increase the *legitim* fund; but that case, if authority as to the effect of the acceptance of *legitim*, is directly opposed in principle to Henderson *v.* Henderson, and Robertson *v.* M'Vean. In Hogg *v.* Lashley, the point now in question never was decided. The final judgment there merely was, that the assignees of Alexander Hogg had discharged his right to *legitim*, but the effect of this, as between Mrs Lashley and Thomas Hogg, the executor, never was raised, so far as appears, and the decision of that question could alone be authority in the present case. In regard to M'Gill *v.* Oxenfoord, it is not clear, by any means, that the acceptance by or for Mrs M'Gill was not made in the life of her father, but it is evident from the terms of the report of the case by *Lord Stair*, then on the bench, that the Court dealt with the case as if the acceptance *had* been in the life of the father; and *Lord Stair*, in his Institute, I. 5. 6. in the editions of 1681 and 1693, corrected by himself, so treats the case, by quoting it as authority for the position, that a father granting bond " delivered in *liege poustie*" to a child in satisfaction of its *legitim*, has the effect of giving the child's share of the *legitim* to the other children.

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LORD COTTENHAM. — My Lords, it will, I think, be well to consider first, how this question would stand independently of authority; and secondly, how far the cases which have occurred operate upon it.

The case put to the consulted Judges, very properly represents the facts. The provisions for the other children are declared to be burdens upon the general disponee, and such provisions are declared to be in satisfaction of *legitim.*

Upon the father's death, the title of the children to *legitim* was complete, each to a proportion of the whole, according to the number of children; and so was the title of the disponee to the general estate complete, but subject to the choice tendered to the other children, of accepting the provision declared for them. If they elected to receive their legitim, the general disponee would retain the whole of the property included in the settlement, subject to payment of the *legitim.* If the children should elect to take under the settlement, their provisions would necessarily come out of the property comprised in the settlement; and the question is, whether in that case the share of the *legitim* which each of such children is compelled to give up, is to be added to the shares of children who elect to take the *legitim,* or to go to the general disponee in lieu of it, in substitution for the provision paid to each child?

Independently of authority, I cannot conceive that this would be doubtful. It has been said, that this is not a *questio voluntatis,* and in one sense that is true, because the father had no power to deprive any child of its share of *legitim;* but consistently with that right in the child, the father might well render to each child a price for its share, and provide for the application of the share given up. If the father had provided that upon any child's accepting the provision tendered by the settlement, that child's share of *legitim* should be given up to the general disponee, the child could not have claimed the provision without performing

the condition which it clearly had the power to do, and if such had been the right of the parties, it could not be contended that they might be defeated by the form in which the transaction was conducted. The father has not so expressed himself in terms, but there can be no doubt of his intention.

He has declared, that the provision for the daughter shall be in full of all that she could ask or claim, in or through his decease in any manner of way. Out of what fund, and from whom had she any right to ask any thing? Out of the funds in the hands of the disponee, and from him. If he be liable to pay the share of *legitim* to which that child would be entitled, and also the provision for that child under the settlement, how can the latter be in full of the former? Is it not clear, that the disponce was not intended to pay both, and yet, according to the contest of the appellant, if any child elected to take its share of *legitim*, that amount alone would be payable, but if it elected to take the provision, then both would be payable.

The situation of the child and the disponee has been aptly assimilated to the position of a creditor and debtor, and acceptance of the provision to satisfaction of the debt. It may also be compared to an offer to the child to sell its share of *legitim*. The father makes the offer, and if the child consents, compels the disponee to pay the purchase money, that is, the provision. Can it be supposed that the father intended, that if the purchase should be effected, the thing purchased, that is, the child's share of *legitim*, should not go to the person whom he compels to pay the purchase-money, but to others who are strangers to the transaction, and whose interests are not in any manner affected by it? The election is tendered to the child, who, by accepting the provision, takes it out of the fund in the hands of the disponee, and it seems to be as consistent with good sense, as it is conformable to the rule of equity, in this country at least, that the property rejected in the election should go to the disappointed

party, that is, to the party from whom the property elected is taken.

The justice of this view of the case is so apparent, that I should much regret to find the Scotch authorities at variance with it. But before I advert to those, I must make some few observations upon what appears to have created the greatest difficulty below, and that is, the supposed similarity between the case of a provision for a child, and a renunciation of the title to *legitim* in the lifetime of the father, and the case of such a renunciation after his death; and, indeed, a clear understanding of this part of the question will, as it appears to me, dispose of by far the greater part of the cases relied upon by the appellant.

It appears to me, that the rule which has been applied to renunciation by children in the lifetime of the father, has no application to renunciation after his death. In the first case, it is held that the effect is the same as if the child had died at the time of the renunciation, and therefore, of course, as if at the time of the father's death the child were not in existence, from which it necessarily follows that the whole *legitim* would be divisible among the other children. Now, apply this principle to a renunciation after the father's death. Upon that event happening, and before the renunciation, the full title to the child's share of *legitim* vested in such child, and consequently was his property at the time of the renunciation, whereas, in the case of the renunciation in the father's lifetime, the child had no such title. Up to the time of the father's death, the right of the children to *legitim*, though spoken of as existing for some purposes, is at most future and subsequent, depending not only upon the amount, if any, of the property, but upon the number of children entitled to partake of it at the father's death. But upon that event happening, all contingency ceases, and the right becomes present and vested; so that if the child die before it receives its share, the representatives are entitled to it, and it is

quite immaterial whether the shares be set apart and allotted, or whether the interest of the child dying be a right to a certain share of an unascertained fund.

So, if the claim of the child to *legitim* be considered as a debt, it can only be so considered after the father's death; for, till that event, nothing is due; and if the renunciation of *legitim*, in consideration of another provision, be considered as a purchase during the lifetime of the father, it is merely a dealing with his property, which can only affect the children's title to *legitim* as it increases or diminishes the fund out of which, to the amount of one-third, or one-half, the *legitim* is to come. But, after the father's death, the disponee who pays the price must be considered as the purchaser. If the rule of law were to add the share of *legitim* so rejected to the shares of the other children, it is obvious that the disponee, and the child accepting the provision, might prevent its operation, and defeat the title of the other children, by the child taking its share of *legitim*, and then exchanging it with the disponee for the provision; and this, though not in form, is the substance of an election to take the provision. The disponee has the property subject to the claim of *legitim*; the other children, in the first instance at least, can only claim their shares according to the number of children; one child, for whom provision is made, remains, and instead of claiming the remaining share of *legitim* from the disponee, demands the provision. Is not that a transaction between such child and the disponee, with which the other children have no concern?

It appears to me, that, upon all analogy and principle, the rejected share of *legitim* belongs to the disponee, and that in every essential particular, the case of a renunciation after the father's death, differs from a renunciation in his lifetime. If this be correct, all the arguments in favour of the appellant fail, and nearly all his authorities fail him. It is necessary, however, to examine them.

FISHER *v.* DIXON. — 6th April, 1843.

The case of Allardice *v.* Smart, in *Robertson's Reports*, page 199, though not directly applicable as to its facts, is important, as shewing, that an election has been considered as having the same effect as it has in England, that is, as giving the rejected property to the person from whom the accepted property is derived.

Passing over those cases in which the renunciation was in the lifetime of the father, the first case in which the question, as to the effect of a renunciation after the father's death, occurred, is that of Robertson *v.* M'Vean, in the year 1813, not reported, but stated at length in the appendix to the respondent's case, and in that case, the title of the disponee to the rejected share of *legitim* was established by the unanimous opinion of the Court.

That the same right was established in Henderson *v.* Henderson, in 1828, reported in *Morrison*, 8199, is admitted. But this principle, it is said, is inconsistent with the subsequent case of Andrews *v.* Sawers, in 1836. That may be so, but I do not think it necessary to express any opinion upon that case beyond this, that assuming it to be inconsistent with the two former cases, I do not hesitate to prefer the principle of those cases.

It appears to me, therefore, that the interlocutor appealed from is supported by the greater authority as well as by the clearest principle.

The claim of William Dixon to a share of *legitim*, as such, was, I think, properly disposed of.

The interest which has arisen in this case, from the very equal division of opinion amongst the Judges of the Court of Session, has appeared to me to call for a distinct declaration of opinion upon the general merits of the case; and as the opinion which I have formed is consistent with the title of the disponee arising from the peculiar form of the renunciation, or rather, of the assignment of the share of *legitim* to the disponee by Mrs Fisher, it is unnecessary to consider what would have been the effect of

that transaction had the title of the disponee upon the general question been considered as invalid.

It appears to me, therefore, that the interlocutors appealed from ought to be affirmed.

Lord Brougham. — My Lords, I so entirely agree with the view which has been taken of this case by my noble and learned friend, that it is quite unnecessary for me to occupy your Lordships with any argument in addition to the very luminous and distinct account which he has given of the reasons upon which it appears that this judgment undoubtedly ought to be affirmed. A difficulty was said to have arisen upon one part of the case, by the conflict between the present decision and the decision in Andrews *v.* Sawers. I have no doubt whatever, that the present decision of the Court below is correct.

Lord Campbell. — I will trouble your Lordships with a very few observations, the subject having been so fully and ably discussed, and in my opinion, so satisfactorily, by my noble and learned friend, who has moved the judgment in this case. If the law upon the subject had been clearly settled by the authority of uniform decisions in Scotland, I should not at all have considered myself at liberty to form an opinion, either of the justice or expediency of the rule. But as it is, at all events, considered a doubtful question, I think I am at liberty to look at what is the justice and what is the expediency of the rule.

Now it seems to me, that justice and expediency require, that a distinction should be drawn between a child accepting a provision in the lifetime of the father, and accepting a provision after the death of the father. If the child accepts a provision in the lifetime of the father, that provision is made out of the general funds of the father, and thereby the fund is lessened, out of which the *legitim* is to be paid to the children upon the father's

death. It is therefore, under these circumstances, perfectly fair, that the children who are not provided for in the father's lifetime, should take the whole of the third of the property, which he leaves at his death. But where the provision is not made till after the death of the father, then it is not made from the general fund. It is made from the dead's part — from that third over which the father had a control; and thereby the fund out of which the *legitim* comes is not in any degree diminished. It comes from the dead's part, which goes to the disponee. Then if the provision comes from that, it seems to me a perfectly fair arrangement, that the *legitim*, which is the substitute, should go to that fund from which the provision is taken. During the life of the father the children have not a vested right in any particular amount of their father's personal property. While in *liege poustie*, he may dispose of the whole, but at his death they have a vested interest in an *aliquot* part of one-third or one-half of his personal property. The rights of the children are at the moment of his death defined and ascertained. There is obviously, upon principle, the broadest distinction between a provision that is made and accepted in the lifetime of the father, and that which is accepted after his death.

Then with regard to expediency, I addressed a question to the very learned counsel, who argued this case at the bar, — if upon the death of a father leaving three children, one of them demands and receives his *legitim*, and gives a discharge to the executor, and afterwards another child accepts the provision that is made for him by the father's will in place of *legitim*, how is the settlement to be made with the third, and does a new demand rise up to the first, notwithstanding his release to the executor? The learned counsel said, that the only answer which he could give, was, that he supposed that there would be no distribution of *legitim*, until the whole estate was wound up, and it was seen whether the different children would accept or

would repudiate the provision intended for them. But where there are infants, or married women, or children abroad, it may be a long while before it can be ascertained, whether a child shall accept the provision made or insist upon the *legitim*; and in the meantime, the children who are of age, who are under no disability, and are upon the spot, will be entitled to claim their *legitim*, that is, their proportionate part of one-third of the personal estate of the father. It seems to me, therefore, that both expediency and justice require the distinction to be made, which a majority of the Judges, certainly a very small majority of the Judges in Scotland, have supported.

Now, with respect to authority, I cannot find that any of the institutional writers have laid down, that if a provision be made by the will of the father, and accepted after the father's death, the children who take the *legitim* shall derive any benefit from the renunciation of the others; I do not find that laid down by *Erskine* or by *Stair*, or any of the institutional writers referred to. All that they lay down is perfectly satisfied by the doctrine which I think is indisputable, and which was established in Hog *v.* Lashley, that if a provision is made and accepted in the lifetime of the father, the consequence is the same as if the child had died, and the remaining children are entitled to share between them the whole third of the property of the father.

Then, with regard to the decisions, the case of M'Gill was most strongly relied upon. Looking to the facts as they appear upon the report, they certainly do not at all lead to the inference that it was considered that the provision had been accepted after the death of the father. That must be regarded as a very uncertain and unsatisfactory decision.

Now we have Henderson's case, which is allowed to be expressly in point in favour of the opinion of the majority of the Judges; but that is supposed to be overruled in Andrews *v.* Sawers. I entirely agree with what has been said by my noble

and learned friends who have preceded me, with regard to Andrews *v.* Sawers. Although that case was respecting the *jus relictæ*, and we are not bound to give any opinion expressly, whether it was well decided or ill decided, I have no difficulty in saying, that if it is supposed to be inconsistent with Henderson's case, I abide by Henderson's case, and that Henderson's case, as far as the *legitim* is concerned, must now be considered as the law of Scotland.

I have not been influenced by English decisions upon the subject, in the slightest degree. But it is a great satisfaction to know, that the law of Scotland and the law of England, upon this subject, are precisely the same. Because, upon investigating the matter, it turns out, that it is clearly settled by the law of England, with regard to orphanage by the custom of the city of London, that if a provision is made for any of the chileren in the father's lifetime, exactly as in Hog *v.* Lashley, the children not provided for, after the death of the father, take the whole of the children's third. But if the provision be by the will of the father, and accepted after his death, then a division takes place as if that child had died after the death of the father, exactly according to the law of Scotland, as it is now settled by the majority of the Judges, and as it is now declared by this House. I therefore entirely concur in the motion of my noble and learned friend, that these interlocutors should be affirmed.

Lord Brougham. — My Lords, I did not enter into the two cases to which my noble and learned friend has very justly referred, because I considered that what fell from us in the course of the argument, and what had been stated by my noble and learned friend who moved the judgment, entirely superseded the necessity for it. But I entirely agree with my noble and learned friend who spoke last, that Henderson's case, if in conflict with Sawers' case, must be taken to be, *quoad legitim*, the law of the land. If we were called upon to decide upon the very

point which occurred in Sawers' case which was not *legitim*, but *jus relictæ*, it would be another question. At the same time, I have no hesitation in saying, that I feel very great difficulty in going along with Sawers' case, even as to the question of *jus relictæ*. As far as the two cases are cognate, as far as the same principle applies to both, (which it appears to me very difficult to refuse assent to, and to say you can draw a line as to the one which shall exclude the other, as far as it goes,) I adhere to Henderson's case, considering that to be the law of Scotland, and if that case be in conflict with the other, perhaps strictly speaking it is not — in terms clearly it is not — the one being *jus relictæ*, and the other being *legitim* — but if the two cases were in conflict, I certainly would, with my noble and learned friend, abide by Henderson's case.

There are peculiar circumstances in this case, which I think should prevent the rule as to the costs from being applied. If so, it must be taken to be owing to the very peculiar circumstances of the case.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed.

SPOTTISWOODE and ROBERTSON — GRAHAM, MONCRIEFF, and WEMYSS, Agents.

[11*th May*, 1843.]

JAMES RUSSELL and Others, Trustees of the deceased James King, *Appellants.*

PATRICK and WILLIAM CREIGHTON, and Others, *Respondents.*

Bill of Exchange. — The addition to a bill of erroneous addresses to the names of indorsers, made after the bill has been drawn, will not vitiate the protest upon it so as to destroy recourse against the indorsers, or preclude the bill from being the foundation of summary diligence.

ON 9th December, 1828, James Harvey granted his promissory note to James Dunlop for L.300. The note was indorsed by Dunlop to Alexander Dunlop; by him to James Hunter; by him to William Hunter; by him to Andrew Dunlop; by him to James King; and finally by him to Messrs Patrick and William Creighton.

The note was dishonoured in the hands of Messrs Creighton. They in consequence protested it, raised diligence, and gave James Hunter, William Hunter, and James King charges of horning for payment of the contents.

The note, when it was passed by King to the chargers, bore simply the names of the different indorsers, without the addition of an address to any of them. Previous to the protest being extended, the note had been so far altered, that an address, more or less erroneous, had been added to the name of each of the indorsers. With these alterations it was copied into the protest, which bore, that the note had been duly protested against "the "above designed" payee and indorsers. The protest in this form was entered upon the record, and set forth in the letters of horning which were raised upon it.

RUSSELL v. CREIGHTON.—11th May, 1843.

The Hunters suspended the charge given to them, upon the ground that additions to the note vitiated it, and precluded it from being the ground of summary diligence. That suspension was carried a certain length, and then was allowed to fall asleep.

James King also suspended the charge given to him, and upon the same grounds. The Lord Ordinary sisted proceedings in King's suspension "until steps are taken by the chargers for "bringing the aforesaid process with James and William Hun-"ter to a conclusion," as the "chargers are not entitled to "insist in diligence against the suspender, the last indorser, if "they have, by their own act, disqualified the said bill from "being the ground of diligence or action against the prior "indorsers, and thus impeded or frustrated the suspender's "right of recourse."

The chargers reclaimed against this sist, and the Court, on 11th June, 1839, altered the Lord Ordinary's interlocutor.

The Lord Ordinary, without determining the point of relevancy, remitted the case to the jury roll, and directed, in a note subjoined to this interlocutor, that the issue should be, "gene-"rally, whether the suspender is resting owing the sum charged "for, which will leave every thing in law, as well as in fact, "open at the trial."

The suspender consented to take a verdict "subject to the "opinion of the Court upon the questions of law arising out of "the facts," and the jury returned a verdict accordingly.

At this stage James King died, and the appellants were sisted in his room.

The Court, on 23d November, 1841, found the verdict ought to be entered up for the defenders, and not for the pursuers, and therefore repelled the reasons of suspension, and found the letters orderly proceeded.

The appeal was taken against the interlocutors of 11th June 1839, and 23d November, 1841.

RUSSELL *v.* CREIGHTON. — 11th May, 1843.

Mr Kelly and Mr Gordon for the appellants. — I. The erroneous descriptions annexed to the names of the indorsers vitiated the protest, and made it incapable of being the ground of summary diligence; for the protest must have the bill annexed to it, and being in this form, is then the measure and rule of the diligence in regard to the persons against whom it is to be directed: but in the present instance, it could not serve as any such rule, for the persons against whom the diligence was to be directed was a matter involved in obscurity and uncertainty. Even with the alterations, the bill might have formed the ground of action, but the privilege of summary diligence was lost to it, Watson *v.* M'Ara.

II. The protest being informal, recourse was lost against the prior indorsees, and thereby any right to recur upon the appellant. The Acts 12 Geo. III. cap. 72, and 23 Geo. III. cap. 18, declare, that there shall be no recourse against drawer or indorsees, unless the bill is protested. The protest must be a formal one, and it cannot be so, where it is defective in an essential particular, in the names of the parties against whom the recourse is to be preserved. The bill, in the form in which it exists at the time of its being protested, must be transcribed into the protest *ipsissimis verbis*, — it is not possible for the notary to vary the copy in the protest from the original, and still less is it possible for him to vary the protest after it is once extended. If, therefore, either an erroneous name, or an erroneous designation exists upon the bill, the defect is transcribed to the protest. Here that was not only the case, but the protest bore *in gremio*, that the bill had been protested against "*the above* "*designed*" payees and indorsers, and as the designations given do not correspond with those of the parties, recourse against them is thereby lost to the appellant, or if not absolutely lost, is so obscure and hazardous as to be altogether unavailable, and

therefore, at all events, the liability of the appellant should not have been determined, until that of the prior obligants had been ascertained.

Mr Solicitor General and Mr Anderson for the respondents were not called upon.

LORD CAMPBELL. — My Lords, It does not seem to me to be necessary to call upon the respondents' counsel to support the judgment below. The question is, whether Creighton and Company were entitled to summary diligence against James King on this promissory note. Now King indorsed the promissory note to Creighton and Company. It lay on King, therefore, to shew why he was not liable. The objection which King made was, that some of the prior indorsers are discharged by what had been done by Creighton and Company. Now, if King had not his remedy over against the prior indorsers, he should not be liable to his indorsee; but it seems to me that there is no ground at all for the appellants' argument, because I think Mr Kelly very properly admitted,—as a gentleman of his great learning and eminence would not at all contend for that which is contrary to what all who are acquainted with the subject are perfectly well aware of, — that the addition to such an instrument, of words which in no respect interfere with the legal operation of the instrument, will not vitiate the instrument. Well, then, the first ground which Mr Gordon suggested cannot possibly be sustained, the bill is not vitiated by adding the place of abode of one of the indorsers, whether that place of abode be correctly stated or not.

But great reliance has been placed upon the place of abode of the indorser being introduced into the protest, and that the protest therefore is insufficient. If the bill is not vitiated by the words which are added, how can the protest be? The bill sets

forth the indorsers, and likewise gives in addition the place of abode of the indorsers, but if that addition be wholly immaterial, it cannot affect the bill. The protest is a protest of this promissory note. Introducing words into the protest that are immaterial, cannot vitiate the protest. The protest is against those who have made the promissory note, and those who have indorsed it, altogether irrespective of their places of abode. The law of Scotland requires, that a promissory note should be protested, and that an inland bill of exchange should be protested; but here is a regular protest, and the only objection made to the protest is, that the place of abode of an indorser is introduced into the protest. That cannot at all lead to any doubt as to the identity of the instrument which is described in the protest, nor to any doubt as to the person who indorsed the promissory note, and against whom recourse must be had on its dishonour.

Then there was a third objection, on which Mr Kelly has not insisted; namely, that in the diligence there has been introduced the place of the abode of an indorser who is dead. But again the same answer occurs: if this is wholly immaterial and does not interfere with the operation of the instrument, introducing it into the diligence cannot vitiate the diligence any more than introducing it into the protest can vitiate the protest. It seems to me, therefore, that the judgment of the Court below was correct, and that it ought to be affirmed with costs.

Lord Cottenham. — My Lords, I am of the same opinion. It appears that additions have been made to the bill, but those additions do not vitiate the instrument itself, it appearing that those additions were made after King indorsed the bill. Then, if the additions do not vitiate the bill, (and that is not disputed,) and if the act of Parliament does not require a protest, the bill would not be affected by the additions. It turns entirely on the question, whether the act of Parliament requiring the protest, makes

that void, which, independently of the necessity of the protest, it would not have made void? I find nothing in the act of Parliament which at all alters the liability of the parties, except so far as it requires that the bill should be protested. Now, if the bill itself is not vitiated by those additions, (and nothing has been stated to induce me to come to the conclusion that the protesting of that good bill is of necessity material,) does the protesting of that good bill make it necessary that the protest should bear on the bill as it stands, or that that which is necessary on the face of the bill is unnecessary on the face of the protest? In my opinion, there is nothing in the act of Parliament which leads to the conclusion that the protest must necessarily be exactly the same as the bill, if the additions are immaterial. For these reasons, I think the judgment of the Court below was right.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors, so far as therein complained of, be affirmed with costs.

CROSBY and COMPTON — DEANS, DUNLOP, and HOPE, Agents.

[The following is the case referred to at page 70.]

JAMES ROBERTSON, son of GEORGE ROBERTSON deceased, — *Appellant.*

ELIZABETH ROBERTSON, otherwise M'VEAN, — *Respondent.*

GEORGE ROBERTSON, the father of the parties, had, by a first marriage, three sons, Andrew, James, and Thomas, and, by a second marriage, a son and daughter, George and Elizabeth. In 1801, he executed a trust-deed and settlement, whereby he disponed to trustees, (his son James being one of them,) his whole effects, upon trusts which were expressed in these terms: — "Declaring hereby, that these presents are granted by me in trust, for use and behoof of Thomas Robertson, my second son, George Robertson, my youngest son, and Elizabeth Robertson, my daughter, equally and proportionally, (and failing any of the said George and Elizabeth Robertsons by death, before marriage or majority, the share of the deceasing party to fall and accresce to the survivor of the said George and Elizabeth, and failing of both of them by death, before marriage or majority, their share to fall to my two eldest sons equally, and to the survivor of them,) which deed of trust above written, and subjects thereby conveyed, I hereby burden with the payment of the sum of L.100 sterling to the said James Robertson, my eldest son, and that within three months from the time of my decease, with interest thereafter during the not-payment; and which sum of L.100 sterling, with the estate in Jamaica, to which I succeeded in right of James Robertson, deceased, my brother, and which I have conveyed over to the said James Robertson, my son, and with the farther sum of L.600 pound sterling, contained in an heritable bond, granted to me by John Cranston therein designed, in Eckford, portioner of Smailholm, of date the 8th day of June, 1797, to which the said James Robertson, my son, will succeed as my heir-at-law, (the said heritable bond, and sums therein contained, not being conveyed to my said trustee in the general conveyance above written,) I consider as the said James Robertson's share of my means and effects; and I farther burden the said trust-deed, and subjects thereby conveyed, with the payment of L.40 sterling to the said George and Elizabeth Robertsons, equally, upon their respectively arriving at majority or marriage, with interest from my decease; which L.40 was money left by the late Agnes Mather, my wife, their mother, and which I consider as their property, and also with the payment of all my lawful debts, death-bed and funeral charges; declaring the above provisions in favour of my children, to be in full contentation and satisfaction to them of all executry, legitim, portion-natural, bairns' part of gear, or others whatsoever, they or any of them can ask, claim, or demand of me, by and through my decease."

In 1805, George Robertson, the father, died, leaving only his son James, and his daughter Elizabeth, surviving him, his second wife having also predeceased him.

In these circumstances, James brought an action of count and reckoning against the trustees of the settlement, and his sister Elizabeth, now Mrs M'Vean, in which, repudiating the settlement, he claimed the whole *legitim* fund.

In support of his claim James insisted that his father's moveable estate was subject to a bipartite division of *legitim* and dead's part. That as Mrs M'Vean claimed under the

settlement, she, by the terms of that deed, renounced her right to *legitim*, and, by necessary consequence, the effect of that renunciation was to leave the *legitim* fund undiminished. That he, as the only other child, was entitled to the whole *legitim* fund, agreeably to the authority of Hog *v.* Hog, 7th June, 1791. That he was so entitled without the necessity of collating the heritage, as collation only took place where there was another claimant on the *legitim* than the party required to collate, whereas here there was none other.

Mrs M'Vean answered, that if James pleaded her renunciation, he could not challenge fulfilment of the testamentary provision, which was the very condition with which the renunciation was qualified. But moreover, on principle, immediately on the death of the father, consideration of the *legitim*, as a gross fund, was at an end. The share of each child then vested *ipso facto* in him, and was descendible to his executors. The child might enforce or abandon the claim to his share. If he abandoned, that, without more—without a conveyance—would not give the right abandoned to the other children; all that it could do would be to leave the fund of the claim undisposed of, and as such, to go to the general disponee, or executor. In the present case, the obligation to renounce the legal claim being attached as a condition to the acceptance of the testamentary provision, the renunciation took effect only from the time of the acceptance, which was after the father's death; and as she was the father's general disponee, by the predecease of Thomas and George, she was entitled, as such, to the share of *legitim*, which, as a child, she would have taken, but for her acceptance of the testamentary provision. So that in any way, James could only be entitled to his own share of the *legitim*, or a fourth of their father's moveables, and that only upon condition of collating the heritage.

James also claimed the whole of the deads' part, as having been virtually renounced by Mrs M'Vean; but as the Court did not decide this branch of the case finally, it is not necessary to notice the arguments in support of this claim.

The Court, on the 16th January, 1813, pronounced the following interlocutor:—

"Upon the report of Lord Balgray, and having advised the informations for the parties, "the Lords repel the claim of James Robertson to the entire fund of *legitim*; as also "repel, in *hoc statu*, his claim to any share or portion of the said fund; but reserve to "him, if he shall see cause, to offer collation of the heritable estate, and other provisions "received from his father, and to be heard before the Lord Ordinary on any claim he may "have to one moiety of the fund of *legitim*, under provision of his collating as aforesaid: "Find, that on the death of George Robertson, junior, the share of his father's means "and effects, appointed for him by his father's trust-deed and settlement, did accrue and "devolve to his sister, Elizabeth Robertson, and decern in the preference in the process "of multiplepoinding accordingly: But with respect to the share of the said means and "effects, appointed by the said settlement for the deceased Thomas Robertson, remit to "the Lord Ordinary to hear parties farther on their respective claims to the same, and to "do therein, and in the remaining points in the cause, as he shall see just."

[16th March, 1843.]

[In error from the Court of Exchequer in Scotland.]

WILLIAM BOYD ROBERTSON WILLIAMSON, *Plaintiff in Error*,

Her Majestys' ADVOCATE GENERAL, *Defendant in Error*.

Legacy Duty — Real or personal — Terms of a will held to import an express direction to sell lands, so as to subject their value in payment of legacy duty, as on personal estate.

King — Costs — If, in a suit for legacy duty, the Crown takes a verdict for more than it is entitled, upon an appeal on this and other grounds, the Crown will not be allowed costs.

ON the 29th November, 1799, Alexander Robertson conveyed to trustees his whole heritable and moveable estate, chattels and effects, goods and gear, debts and sums of money; "as also all "lands, messuages, tenements, and hereditaments presently pertaining to me, or that may pertain or belong to me at the time "of my decease, and particularly, without prejudice to the aforesaid generality, all and whole the lands of Forden, now called "Lawers," which were specially described. Then followed a conveyance of several heritable bonds, and the lands over which they were security — "but always with and under the conditions, provisions, and reservations after specified and in trust always for "the uses, ends, and purposes, after mentioned, viz. Declaring, as "it is hereby expressly provided, that these presents are granted "by me, the said Archibald Robertson, with full power to my "said trustees before named, and to such other person or persons "as I shall appoint by a writing under my hand, at any time in "my life, and even on death-bed, or the survivors or acceptors of "them, and their quorum foresaid, and such other person or "persons, as my said trustees should think proper to assume in

" the event after mentioned, so soon after my decease as may be " judged expedient, to call for, uplift, and discharge, or convey, " the principal sums contained in the several heritable bonds " before assigned, or such parts thereof as shall then be remain- " ing due, penalties, and interest that may be due thereon, " if incurred; and also to call and sue for, receive, discharge, or " convey, or in any other manner and way to dispose, upon all and " every sum and sums of money that may pertain and belong to " me, whether vested in any of the public funds of Great Britain, " or secured on mortgage in England, or in whatever other way " the said sum or sums of money be vested or secured, and also " all other debts and sums of money due and addebted to me, by " whatever person or persons; and also to sell and dispose of the " lands, mills, teinds, woods, fishings, messuages, tenements, and " hereditaments, and others, hereby generally and particularly " disponed to them in trust, and that either by private sale, or " public voluntary roup, and by wholesale, or by parcels, on such " conditions, and at such prices, as they shall think fit. And for " rendering effectual such sale or sales, I hereby grant full power " to my said trustees, or their quorum foresaid, to grant dispo- " sitions," &c. " to the purchasers, with full power also to " my said trustees, or their quorum foresaid, to output and " input tenants, and to grant tacks for such rents and such " spaces as they shall think fit, the same not exceeding the " space of two years: and also to enter and receive vassals " in all such lands as are holden under me; and for that " purpose to grant charters and precepts of *clare constat*, and all " other writs necessary; as also to nominate and appoint, change, " output, and input factors from time to time, with such powers, " and liable to such diligence, as shall be thought proper for " receiving the rents," &c. " and annual-rents becoming due on " said heritable bonds hereby disponed, and prices of the said " lands and others when sold; with power also to input and out- " put a cashier or receiver-general, for receiving the rents from

" the factors, and for applying the same to the purposes of this " trust, in manner particularly after mentioned: Declaring " always, as it is hereby expressly provided and declared, that " my said trustees shall, by their acceptance thereof, be bound " and obliged, after the sale of the said lands, teinds, and others " before disponed, which I recommend to them to be done " as soon as convenient after this trust opens to them, to satisfy " and pay all my just and lawful debts," [then followed a direction to satisfy the provisions to his widow, in the maker's contract of marriage, and then to pay to such persons as he should appoint, such sums as he might direct;] " and after making pay- " ments of these sums, I hereby appoint my said trustees, or " their quorum foresaid, to make up, or cause to be made up, " a stated account of their intromissions and payments made in " virtue of this trust, and to denude themselves of the trust " hereby committed to them, by assigning, making over, or " paying the residue of my means and effects hereby disponed " to them in trust, including the right of fee of the sum to be " liferented by said spouse, in case she shall survive me, in so " far as the same shall not have been disposed of by me, to and " in favour of any person or persons I may think proper to ap- " point, by any writing under my hand, at any time of my " life, and even on death-bed; whom failing, to Rachel and " Ann Robertson, my sisters german, equally betwixt them, " share and share alike, or to the survivor of them, and the heirs " and assignees of such survivors; and on my said trustees " obtaining discharges of the sums I shall think proper to dispone " and bequeath as aforesaid, and on receiving a discharge or " discharges from my said sisters, or survivor of them, or the " heirs and assignees of the survivor, for the residue of the " moneys arising from the funds hereby conveyed in trust, if any " residue shall remain, or from the heirs or representatives of " such of my said legatees, and residuary legatees, as may have

" survived me, but died either before the sale of my said lands " and estate, or before the conveyance or payment is made to " them by my said trustees, I hereby declare, that such discharge " to my said trustees shall be full and complete exoneration to " them, of their whole intromissions had with the whole before " mentioned means and estate, heritable and personal, in virtue " of this trust-right: and father, as it will require time after this " trust opens to my said trustees, before they can turn my heri- " table subjects into cash, and uplift and receive payment of " the heritable and moveable debts due to me," [then followed a direction as to what was to be done in the case supposed.]

Upon the 1st of June, 1812, Archibald Robertson made another testamentary instrument, which recited, that he had executed the deed of 1799 in favour of the parties therein named, for certain purposes, and continued thus: — " amongst others, my said trustees are required to turn " my means " and effects thereby conveyed in trust into money, and to " content and pay, or assign and make over, to such per- " son or persons as I shall name and appoint, by a writing " under my hand, at any time of my life, and even on death- " bed, such sum or sums of money, or proportion or proportions " of the moneys arising from the subjects thereby conveyed and " disponed in trust to my said trustees: Therefore, in terms " of my trust-deed, and in the event of a child or children, " whether male or female, being procreate of my body of my " present, or any subsequent marriage, and existing at the time " of my death, then and in that case, I hereby direct and ap- " point my said trustees, and the quorum of them, to bestow " and employ the profits and produce of my said trust-funds, " remaining after the payments of debts and expenses, for the " use and behoof of the heirs of my body; declaring, that " as soon as my heir shall be married, or attain majority, " then my said trustees shall be obliged to denude of my whole

"trust-estate and funds, in favour of the heirs of my body, but "to return to my said trustees for the uses, ends, and purposes "mentioned in the said trust-right, in case of the failure of heirs "of my body, without otherwise disposing thereof after they "shall have attained majority. But in the event of my decease "without lawful issue of my body, of my present, or any sub-"sequent marriage, or in case of the failure of heirs of my body, "without otherwise disposing of my trust-estate and funds, then, "and in either of these cases, I hereby direct my said trustees, "or quorum of them, to pay the sums of money after men-"tioned to the persons after named, out of my means and effects "disponed and conveyed to them in trust." [Then followed a number of bequests of sums of money, one of them being a bequest of £4000 to the maker's widow, for the purchase of a jointure-house, and of the furniture in the house of Lawers, as far as she might choose, to complete the furnishing of her jointure-house.] The deed then continued thus: — "The residue of my "means and effects, including the right of the fee to the sums "vested and secured for the payment of the said annuities, so far "as not otherwise disposed of by me, I hereby direct my said "trustees to pay and make over to my two nieces, Archibald "Boyd Robertson, and William Boyd Robertson, as my residu-"ary legatees, share and share alike, or to the heirs or assignees "of my said neices who may happen to survive me, and who "may die before my said trustees may finally settle and wind "up my said trust-affairs: Declaring also, that the share of "such of my residuary legatees as may die before me shall fall "to the survivor of them, if not otherwise disposed of by me; "which legacies to the persons before named, I direct my "trustees to pay; and the same shall bear interest from the first "term of Whitsunday or Martinmas after my decease, or at "the first term of Whitsunday or Martinmas after the failure "of heirs of my body, without otherwise disposing of my trust-

" funds as before mentioned, or so soon thereafter, in either case
" as my funds conveyed in trust can be converted into money
" and the annuities to commence and run from the said term
" with the interest on the above legacies; but always with and
" under the provision and declaration as to the payment o
" interest on the legacies aforementioned, as is particularly con
" tained in my said trust-deed, before my funds are turned into
" money: But declaring always, and it is hereby provided and
" declared, that in case my means and effects disposed in trust
" shall not, when turned into money, be equal or sufficient for
" the payment of the sums hereby appointed to be paid, then,
" and in that case, each of the legacies to the persons above
" named, (the legacies to my wife, Mrs Robertson, excepted,)
" shall suffer a proportionable diminution or abatement, but
" not the annuities."

On the 12th of February, 1813, Archibald Robertson died, without having left any heir of his body, or revoked the before recited testamentary instruments, the trusts of which were accepted by the parties therein named, who procured themselves to be infeft in the lands. At the time of his death, Archibald Robertson possessed the sum of L.30,000 in money, and L.20,300 secured by heritable bond. He was also possessed of the estate of Lawers, the free yearly rental of which, at the time of his death, amounted to the sum of L.2166, 0s. 11d. and its value to L.52,446.

The personal debts, funeral expenses, and expenses of trust amounted to L.12,500, and the legacies, payable under the testamentary instruments, to L.20,700. The life-annuities given by the testamentary instruments, together with the jointure of the widow who survived him, amounted to the yearly sum of L.2045, and the value of the annuities, calculated according to the statute, was L.21,175, exclusive of the L.4000 to be applied in purchasing a house for the widow.

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The trustees realized the money secured upon heritable bond, and with it and the personal estate, discharged the debts, funeral expenses, and legacies of the testator; and out of the income of the surplus, and the rents of the real estate, they paid the annuities bequeathed. In this way a sale of the real estate did not become necessary, and accordingly no sale was ever effected.

Archibald Robertson was survived by his two nieces, Archibald Boyd Robertson and William Boyd Robertson. These parties, on the 22d of April, 1813, conveyed to the same persons as were trustees under the testamentary deeds of Archibald Robertson, their whole means and estate, real and personal, and "more "particularly, whatsoever sum or sums of money, or means or "effects, heritable or moveable, they or either of them might be "found entitled to, and to which they or either of them might "succeed, as the nieces and residuary legatees of the said deceased "Lieutenant-General Archibald Robertson, in virtue of his "trust-disposition and supplementary trust-deed, or deeds of "distribution," upon certain trusts.

Archibald Boyd Robertson died, and left William Boyd Robertson surviving her.

On the 25th of July, 1814, the trustees, under the deed of Archibald Boyd Robertson and William Boyd Robertson, of 22d April, 1813, in implement of one of the purposes of the trust to that effect, conveyed to William Boyd Robertson, as the survivor, the land of Lawers which had yet remained unsold under the trusts of Archibald Robertson's testamentary deeds, and, at the same time, they obtained from William Boyd Robertson an indemnity against the consequences of this conveyance, and an obligation to pay any of the debts, legacies, or annuities, of Archibald Robertson, then remaining payable. William Boyd Robertson then entered into the absolute enjoyment of the lands of Lawers.

In 1837, Her Majesty's Advocate-General filed an informa-

tion in the Court of Exchequer in Scotland, against Willian Boyd Robertson, claiming legacy duty on one moiety of the land of Lawers, as being real estate directed to be sold. Willian Boyd Robertson pleaded *nil debet*, on which issue was joined and thereafter the jury returned a special verdict, stating th matters which have been detailed. On this record, judgmen was entered up for her Majesty for the whole instead of a moiet of the duty.

The plaintiff then brought her writ of error returnable i Parliament, which now came on to be argued.

Mr Simpkinson and Mr Gordon for the plaintiff in error. — The deeds do not contain any express direction that in any, and at all events, the lands should be sold; at most they suggest an apprehension in the mind of the maker, that a sale might be necessary in order to effectuate the purposes of the trust, and they contain simply a power given by him for that purpose, and that only; but the amount of the personal estate made it unnecessary for the trustees to effect a sale of the real estate, and therefore, as little from the purposes of the deeds, as from their expressions, can it be inferred that there was any direction to sell.

The terms of the clause of return, in the event of there being an heir of the granter's body, are quite inapplicable to the case of the whole estate being converted into money, as the money, on being paid to the heir, would instantly be mixed with his other funds, so as to make it impossible to ascertain whether he had, in the words of the deed, "otherwise disposed of the estate." This shews that there was no absolute direction to sell.

With regard to the other event contemplated, of there not being any heir of the granter's body, the event which happened, the circumstances made any sale unnecessary, and, as if the maker of the deeds had the possibility of this in his view, he does not simply direct the residue of his estate to be paid, as he had

done, in regard to the money provisions, but he directs it to be "paid" and "made over," — the first of these expressions being inapplicable to the case of a pecuniary residue, and the second to the existence of the estate *in specie*.

No doubt the testator has, in the second deed, recited, that he had "required" his trustees to turn his estate into money, but that recital will not affect the meaning of the terms used in the deed recited; but moreover, this recital is immediately followed by the provision for the event of there being an heir of the body, expressed in terms inapplicable to the case of the estate having been converted into money, shewing thereby that the requisition to turn into money was applicable only to the case of such an operation being necessary for the payment of debts and legacies.

In Attorney *v.* Halford, 1 *Price*, 426, though no sale had been effected, there was indubitably an express direction to sell. The Court, therefore, proceeded on the principle, that what was directed to be done should be considered as having been done. And in Advocate *v.* Ramsay's Trustees, 2 *Cro. Mee.* and *Roscoe*, 224, not only was there an express direction to sell, but the direction had been complied with, and a sale effected. But in the subsequent case of Attorney *v.* Evans, 2 *Cro. Mee.* and *Roscoe* 215, although sales of the real estate had actually been made, yet, inasmuch as they were not expressly directed, and had only been made as beneficial to the parties interested, it was held that legacy duty was not exigible.

LORD BROUGHAM. — My Lords, in this case I entertain no doubt whatever, and therefore I should suggest to your Lordships that the proper course to take will be at once to give judgment for the defendant in error, that is, for the Crown. The question in this case arises upon the event which has happened, of General Robertson leaving no heirs of his body. Their Lordships below, as I understand from those of your Lordships who

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have read their opinions, consider that had he left heirs, t question could not have arisen. But however, we are relieve from all difficulty upon that, by his having left no heirs. I intended probably, that if he left heirs, there should not be sale of his estate, except of such part as might be necessary pay his debts, which would have been more than satisfied by t heritable bond, and by personalty which he had, and that t great estate of Lawers, should not be brought to sale in th event, but the trustees should denude themselves in favour of t heir; but if there should be no heir of the body, in that case the should be a sale. The whole question arises upon this, whetl or not the will, or the two instruments in the nature of a w taken together, amount to a direction to sell. If it amounts a direction to sell the estate at the death of the testator, it w money, and to be dealt with as money, and the legacy du attaches. In every respect it was money. In respect of succession, it would go, not to the heir, but to the next of k It was money in respect of revenue, and was liable to t payment of the duty; and nothing that took place after th could alter the rights, either of the heir, unless he had preclud himself by contract, or of the crown. The state of t property, whether land or money, at the time of the death of t testator, is the only question, and by that state at that ti must be determined, both the rights of private parties, w which we have nothing to do, except by way of argument a illustration, and the rights of the Crown, with which alone have now any concern. My Lords, I think, taking the wh of these instruments together, I can entertain no doubt whate that the intention of the testator was, and that he contempla nothing else, than that in the event of his death, and without heir of his body, the land should be brought to sale. It is a w remarkable expression to which I called the attention of t learned counsel, that where he is speaking of a sale, he sa

"After such sale, *which* I recommend to be made as speedily as possible after my decease." In the stress of the argument, the counsel for the plaintiff in error, made an extraordinary perversion of the grammatical construction, and said, that "which" here, contrary to all the rules of grammar, is to be taken, not as applying to that immediately preceding, which forms the immediate antecedent.

My Lords, the only pretence for saying that, is the use of the word "done." I can see no one shadow of reason for so perverting and torturing the sense as to make the word "which" apply to the words which follow, rather than to the words which precede, except the use of the word "done." It may certainly be said critically, that the word "done" applies more to the act of payment than to the act of sale. You do not say to "*do* "a sale," so readily as you say, "to *make* a sale," or that the sale should take place. Nevertheless, it would still be a very great violence to its meaning to put any such construction.

Then, my Lords, I cannot leave out of view the way in which it is dealt with as residue; he says, "let the whole of my means "and effects," including the produce from the sale of the land which he has appointed to take place, "be divided between my "two neices, Miss Archibald Boyd Robertson, and Miss "William Boyd Robertson, share and share alike, as residuary "legatees." I go a good deal upon that. I think it leaves very little doubt of what he assumed to be the case, and what he intended should be the case; and I go upon it, not merely on account of the use of the words "residuary legatees," although clearly the expression "residuary legatees," applies much more to persons to whom a pecuniary residence is bequeathed, than to persons to whom an estate of inheritance is devised. Yet I agree that "legatee" is sometimes used for "devisee," as the expression "devise" is sometimes used for "legacy." But it is the dealing with the property that I look to. In this

clause it is dealt with as residue. "Let it be divided betweer "Miss Archibald Boyd Robertson, and Miss William Boyd "Robertson, share and share alike," as persons taking the residue of chattels personal.

Well, then, my Lords, last of all, I come to consider the way in which he deals with what he has done before, in the recital to his subsequent deed. Observe, that recital in the subsequent deed, expressly uses the word "required,"—"Whereas, amongst "others, my said trustees are *required* to turn my means and "effects thereby conveyed in trust, into money." It is a very good mode of construing an instrument, to take a man's own words when the meaning hangs doubtful upon the instrument, if it does hang doubtful, which I am disposed here to deny; but it is also a good mode of getting at the meaning, to see what he himself thought he had done. It is clear, that he thought he had not given a power, but an order, for it is a stronger word than "direction;" the word "required" is the strongest word he could use.

My Lords, these being the points upon which, running shortly over them, it appears to me that their Lordships in the Court below have come to a right conclusion, I hold, that it is for your Lordships, without hearing the respondent, to affirm it, and to give judgment for the defendant in error, the Crown. I will only advert in one word to the cases which have been cited. Evans *v.* Evans is a totally different case from the present; for in that case this expression was used, "sell such "part of the estate as may be wanted for the purpose of paying "the debts," and deal so and so with the residue. That is not this case. This is "sell the whole," whether it may be wanted or not, and deal with the residue in a totally different manner give it not to the heir-at-law, but give it to the next of kin. It was not an estate of personalty at all; it was a charge upon the realty.

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Then as to the other case which has been cited, of Durie *v.* Cooles, the words there are, — to which I called the learned counsel's attention during his argument,—" if he shall think fit ;" words empowering and giving a discretion. The author of the deed would never in that case have said, " Whereas I have " *required* my trustees to sell ;" he would have said, " Whereas " I have empowered my trustees to sell." It was a mere power to sell.

Then the case of Cathcart is a totally different case ; the remarkable difference is, that the person to whom the estate was made over was the heir-at-law.

My Lords, I am therefore clearly of opinion, if it should so appear to your Lordships, that in this case we have nothing to do but to give judgment for the defendant in error, with the variation by consent.

Lord Cottenham. — My Lords, I am entirely of the same opinion. It was alleged by the learned counsel for the appellant, that this case turned upon that which is a common question in the courts in this country, — whether this amounted to a conversion of the property, out and out, into personalty ? or whether it was to be considered as a direction only to sell, for the purpose of paying off certain charges, debts, and so on ? That is the criterion by which questions of this sort are determined. The decision turns upon the opinion formed, (varying, of course, in the different cases, with the different expressions used,) upon the question, whether it falls under one denomination or another. Now, my Lords, looking at these instruments, it does not appear to me that they raise a doubt upon this matter. It is not necessary that the words of the power should contain an absolute direction to the trustees to sell. The intention of the testator must be gathered from all the provisions of the deed, and I cannot find any provision in that deed which raises any question as to the intention of the author of the instrument, that the

estate should be sold in the event of the two nieces being entitled to take the property. In that power, he says, it shall be executed as soon as convenient. And then he proceeds to give the surplus of the property, and he describes it in terms indicative of money, the produce of the sale of the lands *in specie*; and then he provides, in terms which are very significant, for the interim management of the property. He says, "and farther, as it will require "time, after this trust opens to my said trustees, before they "can turn my heritable subjects into cash." He then provides for the interim management of the property.

And then, my Lords, comes the second deed. Taking all these expressions together, upon the construction of the first deed, I apprehend no real doubt can be raised; but in the second deed, he puts his construction upon what he has done; he says that he had required the trustees to turn the estate into money. Now, if this had been a case in an English Court of Equity, and the question was, whether it was a power out and out, there is no case within my recollection which would throw a doubt upon that subject; and cases have occurred in Scotland which shew that the rule of decision there has been founded upon the same principle as in this country, and therefore, that the law is the same in the two countries. It appears to me, my Lords, quite clear, that the two instruments, taken together, give a direction to sell, and convert the estate from land into money; and therefore the gift, which is the subject of the present appeal, is for the purpose of the legacy duty to be considered as a gift of money and not a gift of land.

Lord Cambpell.—My Lords, it is quite sufficient for me to say that looking at these deeds, I am thoroughly convinced, that by them General Robertson intended, that if he died without leaving a son the estate of Lawers should be sold. He died without leaving a son leaving no discretion to the trustees. Under these deeds they were bound to sell, therefore this is to be considered as liable to the duty

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It is entirely distinguishable from those cases which have been cited, where there was merely a discretionary power which the trustees might exercise or not, that merely amounting to an equitable charge upon the real estate, and not converting the real estate into personalty.

My Lords, I have had the advantage of reading the very able and luminous judgments of Lord Jeffrey and Lord Cunningham, who gave judgment in the Court below. They seem to me to have reasoned it with great ability, and I entirely concur in the views that they took of this case.

Mr Twiss. — The judgment will be with costs. The crown, under the statute, is entitled to costs.

Lord Brougham. — No. There can be no costs. The judgment below is erroneous in giving the whole duty.

Mr Twiss. — The verdict was merely arranged, and the error crept in by mistake.

Lord Brougham. — The sum is expressly stated in the judgment. You might have saved the expense of the hearing by consenting beforehand to its rectification.

Ordered and Adjudged, that the judgment given in the Court of Exchequer, in Scotland, be affirmed, but with this variation, that her said Majesty may have execution against the said William, or Wilhelmina Boyd Robertson Williamson, for the sum of one thousand two hundred and forty-nine pounds, two shillings, and one half-penny, being the amount of duty payable by the said William, or Wilhelmina Boyd Robertson Williamson, by consent of parties, instead of for the sum of two thousand five hundred pounds in the said judgment mentioned; and that the record be remitted to the end such proceeding may be had thereupon, as to law and justice shall appertain.

RICHARDSON and CONNELL. — SOLICITOR FOR STAMPS AND TAXES, Agents.

[Heard, 4*th April*, — Judgment, 18*th August*, 1843.]

HARRY LEITH LUMSDEN, *Appellant.*

HENRY LUMSDEN, and others, *Respondents.*

Tailzie. — Where an entail prohibits sales, and irritates all "deeds "made or granted" in contravention, it will be effectual not only against sales, to be completed by deed executed, but also verbal sales, to be followed by *rei interventus*, and enforced by adjudication in implement.

Ibid. — Irritant clause *held* not to be enumerative, but general, and sufficiently comprehensive to embrace all the acts prohibited.

Ibid. — If a word be used in one part of an entail, where it is capable only of one meaning which will support the entail, it must receive that meaning, though it should occur in another part, in another meaning, which, if given effect to as to the first part, would destroy the entail.

HARRY LUMSDEN, in 1794, executed an entail of his lands of Auchindoir, which contained prohibitions against altering the order of succession, selling, or contracting debt. These prohibitions were expressed in these terms: — "with and under the "limitations and restrictions after mentioned, namely, with and "under this limitation and restriction, that it shall noways be "lawful to, nor in the power of, any of my said heirs of tailzie, "or substitutes before written, to innovate, alter, or infringe "this present tailzie, or the order of succession hereby esta- "blished, or to be established by any nomination or other "writing to be made by me, or to do or grant any other act "or deed that may infer any alteration, innovation, or change "of the same, directly or indirectly. But with this exception "always, that in case any apparent or presumptive heir or sub-

"stitute, who might at any time succeed to the said lands and "estates, in virtue of the above destination, shall by law be "incapable of succeeding to the same, by reason of forfeiture "or attainder, or other legal incapacity which may exclude any "such apparent or presumptive heir or substitute, or the heirs "of their bodies, from taking, holding, and enjoying for their "own use and benefit, my said lands and estates, in virtue of "the substitution before written, then, and in that case, it shall "be lawful to any heir of tailzie who shall be in the right of "the said lands for the time, as oft as such case shall happen "in all time to come, so far to alter the destination above writ-"ten, as to exclude such incapable person or persons from the "right of succeeding to the foresaid lands and estates, notwith-"standing the foresaid restriction; and for that end, to grant "such deed or deeds for excluding the foresaid incapable person "or persons as shall be competent, in the same manner as an "unlimited proprieter might do. Provided, nevertheless, that "with respect to the said whole heirs of tailzie, the prohibition "to alter the course of succession shall have their full force and "effect; and with and under this restriction and limitation also, "that it shall not be lawful to, nor in the power of, the said "heirs of entail, or any of them, to sell, dispone, alienate, "burden, dilapidate, or put away, the lands and others above "written, or any part thereof, either irredeemably or under "reversion, or to contract debts, grant bonds, or any other "writs, deeds, or securities, or to do any other act, civil or "criminal, either prior or posterior to their succession to the "lands and others hereby disponed, that shall be the ground of "any adjudication, eviction, or forfeiture of the foresaid lands "and others, or any part thereof, or anyways to affect or burden "the same; nor shall the said lands and estate, or any part "thereof, be affected by, or subject to, any tences or courtesies "to the wives and husbands, or provisions to the younger chil-

"dren, of the heirs and substitutes above written, or any of them."

These prohibitions were fenced by the following irritant and resolutive clauses: — "And with and under these irritancies "following, as it is hereby expressly provided and declared, "That if the said heirs of entail, or any of them, shall contra- "vene any of the conditions, provisions, limitations, or restric- "tions herein contained, either by failing or neglecting to fulfil "and perform the said conditions and provisions, and every "one of them, or by acting contrary to the said limitations and "restrictions, or any of them, then, and in any of these cases, "the person so contravening, by failing or omitting to imple- "ment the said conditions and provisions, or acting contrary to "the said limitations and restrictions, or any of them, shall, for "him or herself alone, not only forfeit, omit, and loose all "right, title, and interest to the foresaid lands, in the same "manner as if the contravener were naturally dead, and "the rights thereof shall devolve upon the next heir of tailzie, "though descended of the contravener's body, to whom it shall "be lawful, whether major or minor at the time, to pursue "declarators of irritancy, and to make up titles to the said "lands and estates, by serving heir to the person last infeft "therein before the contravener, or to the contravener himself "or herself, without being anyways liable for any of the debts "and deeds of the said contravener, or to make up titles by "declarator or adjudication, or any other way by law compe- "tent; and all the debts and deeds of the said heirs of tailzie, or "any of them, contracted, made, or granted, as well before as "after their succession, to the said lands and others, in contra- "vention of this present entail, and the conditions, provisions, "limitations, and restrictions, herein contained, and all adjudi- "cations, or other legal execution and diligence, that shall "happen to be obtained or used upon the same, shall also not

"only be void and null, with all that shall or may follow there-
"upon, in so far as they might anyways effect the said lands
"and estates: but likewise the heirs of entail respectively, upon
"whose debts or deeds such adjudications have proceeded, or
"who shall have contravened the conditions, provisions, limita-
" tions, or restrictions herein contained, in any other way, shall,
" *ipso facto*, loose and forfeit their right and title to the said
" lands and estates, and the same shall devolve to the next heir
" of entail, in like manner as if the contravener were naturally
" dead, and that freed and disburdened of all the debts and
" deeds of such contravener, and of all adjudications and other
" diligences deduced thereon."

Of the same date with the entail, the maker executed a trust-deed, by which he directed certain moneys to be invested in the purchase of land to be entailed in the same terms. These purchases were accordingly affected, and relative entails were executed in 1808 and 1812.

In 1839, the appellant, the heir of entail in possession, brought an action against the substitute heirs of entail, setting forth the different deeds of entail, and concluding to have it found, that he had a right to sell and alienate the several lands for a price or onerous consideration, and to execute all conveyances and deeds necessary for effectually conveying the same, or for enabling the purchaser to attach the lands by adjudication, or otherwise; and that upon the sale or alienation, he should have the sole right to the price or other consideration, and power to grant a valid discharge for the same to the purchaser: that the price or other consideration, would become his absolute property; and that he would have free power to dispose of the same at pleasure; and would not lie under any obligation to invest the same in the purchase, or on the security of any other lands, or otherwise, for the benefit of the defenders, or any of them, and that they had no right to interfere with, or control him, in the dis-

posal of the price or other consideration, in any manner of way; and also, that the defenders would have no claim against him, or against his heirs and representatives, in the event of his death, for or in respect of his so doing in any of the above particulars.

The defence pleaded to this action, was, that the entail of Auchindoir was a strict and complete entail, according to the law of Scotland; that the irritancies were directed against *all* acts of alienation by sale or otherwise, and the pursuer was therefore effectually barred from selling the estates, or any part of them, even for an onerous consideration.

The Record was closed upon the summons and defences.

The Lord Ordinary then ordered cases, which he directed to be boxed, and reported to the Inner House.

Upon advising these papers, the Court assoilzied the defenders.

The appeal was taken against this interlocutor.

Pemberton Leigh, Penney and Gordon, for appellant. — The judgment here is understood to have proceeded on the authority chiefly of two cases decided in the Court below, *Ballenerieff and Finzean*, both of which have not been appealed, and were decided prior to the judgments of this House, reversing those of the Court below, in a class of cases in which the Court below had introduced an over liberal mode of construing entails.

The appellant asks to have it declared, that he is entitled to sell the lands, notwithstanding the fetters of the entail, as not being effectual against that act. To be effectual, the prohibitory, resolutive, and irritant clauses must all concur; but it will be observed, that there is no irritancy of sales, unless they are embraced by the word "deeds." In order to see whether they can be embraced by that word, it is necessary to see in

what signification it is used in the prohibitory and resolutive clauses, and in the irritant clause itself. In the prohibitory clauses, "deeds" first occurs in the prohibition against altering the order of succession, and there it is used in its general as well as technical sense. In the prohibition against selling, "deeds" does not occur at all. In the prohibition against contracting debt, it does occur, but is there plainly used in a strictly technical sense, as applicable to legal instruments, being governed by the verb, "to contract:" this is shewn more distinctly by the use of the verb "to do," in the posterior and alternative part of the sentence.

In the resolutive clause, which is broad enough in its terms to embrace all the prohibitions, "deeds" does not occur. But in the irritant clause, it does again, as a nominative, along with "debts," to the verbs "contracted," "made," and "granted." As used here, it is obviously in a technical sense; "contracted" is only applicable to debts, and both "made" and "granted" can, according to the idiom of the language, only be used with the word "deeds," as denoting the making or granting of a legal instrument. If speaking of any act done or committed, you cannot say that such an act was "made" or "granted."

Then, in the additional resolutive clause which follows the irritant, "deeds" is again used in the same sense in which it is in the irritant clause, and, as applying to the particular deeds there mentioned, for it is the debts and deeds upon which "*such*" adjudications (being those mentioned in the irritant clause) have proceeded; and then the clause goes on to speak of contraventions "in any other way," suggesting, that "debts and deeds contracted, made, or granted," did not embrace every mode of contravention specified in the prohibitory clause.

"Deeds," then, is not used in a single unvarying sense. In one part,—the prohibition against altering the order of succession,—it is used in its ordinary grammatical sense, to express an act

done; but in all the other instances it is used in a strictly technical specific sense, to express a legal instrument; and on all the principles which have been applied to the construction of entails, which are always in favour of liberty, and against restraint, "deeds," in the irritant clause, can receive only its specific technical meaning, as applying to legal instruments.

[*Lord Campbell.* — You say, that if a word is found in the prohibitory clause, having a specific sense, and if it is also found in the irritant clause, it should receive there a specific sense, though it might bear a generic one.]

Precisely. We say, that where a word occurs in an entail admitting of two meanings, that construction of it must be adopted which goes rather to cut down, than to support the entail. That is a doctrine which received effect in Speed *v.* Speed, 15 *D and B*, 618; and Lang *v.* Lang, 1 *M'L. and Rob.* 893; and in Dick *v.* Drysdale, 14th January, 1812.

But, independently of this, the construction of the irritant clause shews, that "deeds" was intended to be used there in a specific technical sense. The clause is not like the resolutive, general in its terms, so as to embrace "deeds" in any meaning in which it is used, but, on the contrary, it is enumerative, and confined to specific prohibitions; it begins with "debts," which is a specific prohibition, and joins to it "deeds," and as to both, qualifies them by the verbs "contracted, made, or granted." It is not, therefore, *all* deeds that are irritated, but only deeds "made or granted." Indeed, judging from the juxtaposition of "deeds" with "debts," and the qualifications of them both by the verbs alluded to, the irritancy seems to confine itself to debts, and to deeds (that is, legal instruments) made in relation to debts, and not to be broad enough to embrace even deeds (that is, legal instruments) made in relation to other matters. It was so found in Barclay *v.* Adam, 1 *Sh. App. Ca.* 24, and in Lang *v.* Lang, 1 *M'L. and Rob.* 893.

Farther, the irritancy is confined to such deeds as may be the ground of adjudication, for the clause goes on to irritate "all "adjudications, or other legal execution and diligence that shall "happen to be obtained or used upon the same." And not only so, but it is confined to deeds which may be the ground not of adjudication generally, but of adjudication having the character of execution or diligence, for the words are "adjudication or *other* execution."

If the irritant clause, then, is not general, but enumerative, its enumeration must be sufficiently comprehensive to embrace all the acts prohibited, and that even although the clause may set out with expressions which, if it had been confined to them, would have embraced every act prohibited. Barclay *v.* Adam, 1 *Sh. App.* 24; Dick *v.* Drysdale; Horne *v.* Rennie, 1 *Sh. and M'L.* 142.

Assuming the irritant clause to be broad enough to embrace all written instruments whatever, will it embrace *the act* of selling the lands? It is directed only against "debts contracted" and "deeds made or granted," — not "deeds made or granted and "*acts done*," as in most entails. This is plainly not sufficient to embrace in terms the act of selling. In Duffus's Trustees *v.* Dunbar, 4 *B. and Murr.* 523, "contracting debt" was prohibited; but inasmuch as only the written instruments by which the debt might be constituted, was irritated, it was held that the entail would not bar the act of contracting debt.

It is said, however, that a sale cannot be completed without deeds being made or granted, and that the irritancy is broad enough to embrace such. Admitting the observation as to the completion of sales to be true, entails are *strictissimi juris*, and the act operating the contravention must itself be irritated; it will not do to omit the act, and irritate the consequences of the act — to irritate the deeds necessary to complete a sale, and

omit the sale itself. That was settled in Lang v. Lang, 1 *M'L. an Rob.* 871; there sales were prohibited, and "deeds" in contra vention were irritated, yet it was held, that sales were not irri tated, though in that case, as in this, it might have bee argued, that sales could not be completed without deeds bein executed.

It is not true, however, that a sale cannot be completed with out a deed; it is perfectly competent to make a valid sale b verbal contract followed by *rei interventus.* The purchaser coul enforce performance of such a sale by adjudication in implemen and obtain infeftment and possession by charter and sasine fro the superior, without a single deed being executed by the hei selling. In this view, supposing it competent to overlook an act and irritate its consequences only, there would not necessarily b any consequential deed to irritate.

[*Lord Campbell.* — Could the Court decree the party to exe cute a disposition in implement, where the entail would forfe his right if he executed it?]

Certainly not. But he might be passed over. The Cou need not decree any disposition to be executed, but, by force o its own decree, give the lands to the purchaser.

[*Lord Chancellor.* — Advert to the conclusion of the sum mons.]

We ask more than we are entitled to, certainly; but that wi not prevent us obtaining what we are entitled to.

[*Lord Campbell.* — What do you ask?]

Only the first conclusion.

But if a deed were necessary to complete a sale, and it wer competent to overlook the sale itself, and irritate such deed only, as already observed, this has not been done, for the irritan clause is confined to deeds upon which "adjudication" or *othe* legal execution and "diligence" may follow. Adjudication i implement of a sale, is not execution, but a judgment.

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Mr Solicitor General— Sandford and Moir, for the Respondents.

LORD CAMPBELL. — My Lords, the pursuer in this case contends, that although the entail contains a sufficient prohibitory clause against selling, and every other mode of alienation, the irritant clause is defective in as far as selling is concerned, and that he is entitled to execute deeds of sales, or at any rate that he may enter into verbal contracts of sale, which, being followed by *rei interventus*, or part performance, may effectually be carried into execution, and, therefore, that there should be a declaration in his favour as to this limited right.

My Lords, I am of opinion, that the defenders were properly assoilzied from all the conclusions of the summons.

It has been said, that in pronouncing the interlocutor appealed from, the Judges of the Court of Session, from an obstinate attachment to entails, have disregarded the decisions of this high Court of appeal upon the subject, and the expressed opinions of noble and learned Lords, in recommending those decisions to the House. After a careful reference to all the authorities referred to, I have arrived at the conviction, that the interlocutor is in entire accordance with your Lordships' prior decisions, and with all the dicta relied upon, such dicta being taken in connection with the cases in which they are found, and in the sense in which they were evidently delivered.

There is no doubt, that by the law of Scotland, entails are *strictissimi juris*, that the prohibitory, irritant, and resolutive clauses must be complete and perfect in themselves, and that they cannot be supported by implication or probability, or mere general intention, not distinctly expressed. But the law of Scotland does allow entails, if the entailer, by language taken in its grammatical, natural, and usual sense, prohibits the institute and heirs from altering the succession, from alienating, and from

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burdening the estate with debt, declares all acts and deeds i contravention of the prohibitions void, and provides, that tl contravener forfeiting his right, the next heir-substitute sha succeed. This meaning must be clearly and unequivocall expressed, but for that purpose, no *voces signatæ*, no *verb solennia*, are required, and any language is sufficient which do not admit of doubt or ambiguity.

I think the doctrine contended for by the appellant, and ver unnecessarily denied by the respondents, is sound, that "if a expression in an entail admits of two meanings, both equall technical, grammatical, and intelligible, *that* construction mus be adopted which destroys the entail, rather than that whic supports it." But the two meanings of the expression must b equally technical, grammatical, and intelligible, in the plac where it occurs, and taken with the context. If, where th expression is found, it can only fairly have one meaning ascribe to it, which will support the entail, it shall have this effec although, found elsewhere, and in a different collocation, it ma be susceptible of another meaning, by which the entail woul be destroyed. In respect of the perpetuities created by entail being considered odious by the law, we are entitled to apply t them strict rules of construction, but we have no right to perver or defeat the distinctly expressed intention of the entailer. Th right of entailing which was given by the legislature, if thoug pernicious, must be taken away by the legislature. Attempts b Judges indirectly to repeal it, would probably only prolong i duration, and increase its mischiefs.

In the present case, there being an ample prohibitory claus against selling, or any other mode of alienation, the entaile declares, that all the debts and deeds of the said heirs of tailzi or any of them, contracted, made, or granted, in contraventio of the entail, and the conditions, provisions, limitations, an restrictions, therein contained, and all adjudications, or othe

legal execution and diligence, that shall happen to be obtained, or used upon the same, shall be void and null, with all that shall or may follow thereupon, in so far as they might in anyways affect the said lands. Does not this apply to make sales void?

In construing this clause, I differ from the Lord President and Lord Gillies, in so far as they seeem to have thought that the word "*deeds*" might be taken in what is called its vernacular sense, in which it is nearly synonymous with acts. The *deeds* here spoken of were to be "*made or granted*," terms only applicable to written instruments; but although the clause contains no express irritancy of acts without writing, I think it applies to deeds of sale, and that, irritating them, it is sufficient. An attempt has been made to confine it to deeds on which adjudications, or other legal diligence, shall happen, affecting the lands entailed; but the entailer expressly declares, that all deeds made or granted in contravention of the entail, and the conditions and restrictions therein contained, shall be void; and there can be no doubt, that a deed of sale would be in contravention of the entail, and the conditions and restrictions therein contained, whereby selling is expressly prohibited.

But we are strongly pressed by a new objection which was not taken in the Court below, which is, for the first time, started in the appellant's case laid upon the table of this House, although, if well founded, it would not only be fatal to this entail, but to many others which have been challenged on different grounds in the Court of Session, and at your Lordships' bar,—that though the irritant clause strikes at deeds or writings, containing any contract of sale, or conveyance to a purchaser, it is insufficient if it does not irritate verbal agreements to sell, which may be followed by *rei interventus*, or part performance; and that there ought to be a declaration that the pursuer is entitled to alienate in this manner.

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Although the objection was not taken below, and we have not the advantage of the opinion of the learned Judges of the Court of Session upon it, yet, as it arises upon the record, and, if well founded, could not be removed by any additional allegation or proof, I think we cannot now prevent the appellant from urging it. If your Lordships thought it entitled to much weight, you would probably remit the case for the opinion of the Scotch Judges before giving effect to it. But I clearly think that it was not brought forward sooner from the well founded conviction that it is entitled to no weight whatever.

The frame of the summons would, in this case, be a sufficient answer; for although a pursuer may be entitled to a judgment for a part of the prayer of his conclusion, when he cannot support the whole, there is no rejection of those parts of the prayer, allowed in this mode of arguing to be untenable, which would leave a sensible residue to be made the foundation of an interlocutor in his favour. He cannot claim a declarator that he has full power to sell the lands, for this must mean by deed of sale, in the usual manner in which the transaction is conducted between buyer and seller.

But independently of this technical answer, I am of opinion, upon the merits, that he could not have framed the summons so as to be entitled to a declarator that he could alienate by a verbal contract of sale, to be followed by *rei interventus*. Where an entail contains a prohibition against selling or alienating, with an irritancy of all deeds of sale or alienation, and a resolution of the right of the contravening heir, I apprehend that this new fangled mode of alienation, by a verbal contract and *rei interventus*, could not be made effectual. Where a vendor is seized, in *fee-simple*, and agrees, by word of mouth, to sell, there is no doubt, that after *rei interventus*, the Court would decree a specific performance, and would order him to execute the proper deeds to make a good title to the purchaser. But no authority has

been cited to us to shew that such a decree would be pronounced against an heir of entail, who, by executing deeds, would incur a forfeiture; or that, in such a case, the Court, without the intervention of any deed by the heir, would pronounce a judgment to enable the purchaser to obtain infeftment from the superior of whom the lands are holden.

From information I have obtained, on which I can place implicit reliance as to the mode of proceeding for a specific performance in Scotland, I find that an unlimited proprietor, who, after *rei interventus*, refuses to convey, in terms of a verbal bargain, is first of all decreed to convey, and upon being charged upon such decree, may be subjected, as a contumacious debtor, to a process of adjudication in implement, under which the purchaser may obtain an entry with the superior without any deed of conveyance executed by the seller. But all this proceeds on the radical assumption that he was legally and equitably bound and entitled to make such a conveyance, and it is only, in the first place, to enforce the performance of this clear duty, that the original decree is issued, and process is afterwards allowed to obviate the effects of his obstinate non-performance. But when the contracting party has no legal right, or legal power, to execute the conveyance, for the wilful and unjust withholding of which alone the law interferes, there can be no call for such interference, and neither the decree nor the adjudication can be demanded. The only remedy of the purchaser would be damages, *loco facti imprestabilis*.

But when the fact is legally imprestable by reason of the deed of entail, I apprehend that this might be pleaded by the substitute-heirs, as well as by the seller, if, conniving with the purchaser, he were to decline to take the objection, the substitute-heirs having an interest to be protected, and the ground of contumacious refusal to perform a legal obligation being, in truth, more completely taken away in such a case, than in a question with the party actually contracting.

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If it were necessary to go farther, I am inclined to think, that, as in the case supposed, of a verbal bargain with *rei interventus*, the entailed estate can only be reached by adjudication in implement, the obligation so to be implemented would, according to the law of Scotland, be held and dealt with as a *debt*, and consequently the transaction would fall under the irritancy of debts leading to eviction.

But it is enough to say, that in the absence of all precedent and authority to support the argument of the appellant, I come to the conclusion, that this is a mode of alienation by an heir of entail — forbidden to sell with an irritancy of deeds of sale — wholly unknown to the law of Scotland, and which the law of Scotland would not recognize.

If the objection were to succeed, it might unfetter a great part of the entailed land in Scotland, for I apprehend, that the introduction of the word "acts" into the irritant clause would not cure it, a verbal contract to sell the estate, to be followed by *rei interventus*, not being an act more than a deed within the meaning of the fettering clauses.

But I am of opinion that we are not at liberty to get rid of entails by any such devices or subtleties.

The real question, therefore, is, whether there is any prior decision of this House, to shew that the irritant clause in the present entail does not sufficiently strike at deeds of sale, although it clearly does, according to its grammatical, natural, and usual meaning?

I will shortly examine the decisions relied upon by the appellant, which it is supposed that the Judges, in pronouncing this interlocutor, have disregarded.

In the Tillycoultry case, Bruce *v.* Bruce, *Mor.* 15539, the irritant clause, in generally referring to the prohibitions by the words "all which deeds," &c., was considered sufficient, and the decision proceeded on a defect in the resolutive clause, which was limited to a contravention, "either by not assuming the name

" and arms of Bruce of Kinross, or heirs-female not marrying " a gentleman of the same name," &c. Here the material prohibitions which are necessary to constitute a valid entail, were, according to the grammatical, natural, and usual use of the language employed, excluded from the resolutive clause.

So in the Bonnington case, Scott and Moncrieff *v.* Cunningham, 3 *Sh.* and *M'L.*, 156, the resolutive clause was held to be defective, because it proceeded upon the principle of specific enumeration of acts to work a forfeiture, not of a general reference to the acts that had been prohibited; and selling, which had been prohibited, was omitted in the enumeration. Dick *v.* Drysdale (*Fac. Col.*, 14th January, 1812) was much relied upon as a decision of the Court of Session, in which the word " deeds," in the irritant clause, was held not to apply to leases; but this was upon the express ground, that from the epithets by which it was qualified, the entailer had restricted the meaning to feudal delinquencies only, and therefore, that it did not apply to leases.

In the Blair-Adam case, Barclay *v.* Adam, 1 *Sh.* and *M'L.*, 24, which came before this House, the irritant clause was held defective, because the meaning of the word "deeds" in it was limited by the word "which" referring to a particular class of deeds before described, from which deeds of sale and alienation were excluded, and, therefore, according to the grammatical, natural, and usual meaning of the language employed, deeds of sale and alienation were not struck at.

In Horne *v.* Rennie, (3 *Sh.* and *M'L.* 142,) the irritant clause contained the general words, "as shall contravene and fail in any part of the premises;" but the clause is framed on the principle of specific enumeration of the acts of contravention which are to be irritated, and is therefore plainly distinguishable from this irritant clause, which generally refers to the acts prohibited. Lord Jeffrey's interlocutor in that case, which was

reversed by the Second Division of the Court of Session, was affirmed by this House; and it would have been strange if there had not been a clear distinction between it and the present, in which the same most acute, and learned, and cautious Judge, held, as Lord Ordinary, that the irritant clause, by reason of its generality, is sufficient. Lord Cottenham, then Lord Chancellor, there says, "It comes to this question, whether there has been an attempt to enumerate the particular acts prohibited?" intimating an opinion, that if there be no such attempt, and there be general words, which, according to their grammatical, natural and usual meaning, will include the act prohibited, the irritant clause is sufficient. In this irritant clause there is no such attempt at enumeration.

But we have been most strongly pressed with the case of Lang *v.* Lang, and with certain dicta of a noble and learned Lord, when that case was decided. Now, I concur in the decision, and the observations which accompanied it. There, in addition to a fatal objection to the prohibition against altering the order of succession, the irritant clause was clearly defective for immediately after a prohibition against any deed, whereby the lands might be adjudged or evicted, it declares, that "all "*such deeds* shall be void and null," namely, deeds whereby the lands might be adjudged or evicted, without any irritancy of deeds to alter the order of succession, or to sell, or alienate.

Then as to the dicta. To prop up the new objection as to a verbal contract of sale with *rei interventus*, reliance is placed on an observation of Lord Brougham, that "the irritancy must be "levelled at the act of altering the order of succession; it is not "sufficient that it be levelled at it as a consequence and implica"tion from the act of sale, it must comprehend distinctly an act "which shall touch or affect the order of succession." What does this amount to? That an irritancy of an act of sale does not by implication, amount to an irritancy of an act to alter the suc

and arms of Bruce of Kinross, or heirs-female not marrying a gentleman of the same name," &c. Here the material prohibitions which are necessary to constitute a valid entail, were, according to the grammatical, natural, and usual use of the language employed, excluded from the resolutive clause.

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In the Blair-Adam case, Barclay *v.* Adam, 1 *Sh.* and *M'L.*, 4, which came before this House, the irritant clause was held effective, because the meaning of the word "deeds" in it was limited by the word "which" referring to a particular class of deeds before described, from which deeds of sale and alienation were excluded, and, therefore, according to the grammatical, natural, and usual meaning of the language employed, deeds of sale and alienation were not struck at.

In Horne *v.* Rennie, (3 *Sh.* and *M'L.* 142,) the irritant clause contained the general words, "as shall contravene and fail in any part of the premises;" but the clause is framed on the principle of specific enumeration of the acts of contravention which are to be irritated, and is therefore plainly distinguishable from this irritant clause, which generally refers to the acts prohibited. Lord Jeffrey's interlocutor in that case, which was

reversed by the Second Division of the Court of Session, was affirmed by this House; and it would have been strange if there had not been a clear distinction between it and the present, in which the same most acute, and learned, and cautious Judge, held, as Lord Ordinary, that the irritant clause, by reason of its generality, is sufficient. Lord Cottenham, then Lord Chancellor, there says, "It comes to this question, whether there has been an attempt to enumerate the particular acts prohibited?" intimating an opinion, that if there be no such attempt, and there be general words, which, according to their grammatical, natural and usual meaning, will include the act prohibited, the irritant clause is sufficient. In this irritant clause there is no such attempt at enumeration.

But we have been most strongly pressed with the case of Lang *v.* Lang, and with certain dicta of a noble and learned Lord, when that case was decided. Now, I concur in the decision, and the observations which accompanied it. There, in addition to a fatal objection to the prohibition against altering the order of succession, the irritant clause was clearly defective for immediately after a prohibition against any deed, whereby the lands might be adjudged or evicted, it declares, that "all "*such deeds* shall be void and null," namely, deeds whereby the lands might be adjudged or evicted, without any irritancy of deeds to alter the order of succession, or to sell, or alienate.

Then as to the dicta. To prop up the new objection as to verbal contract of sale with *rei interventus*, reliance is placed on an observation of Lord Brougham, that "the irritancy must be "levelled at the act of altering the order of succession; it is not "sufficient that it be levelled at it as a consequence and implica"tion from the act of sale, it must comprehend distinctly an act "which shall touch or affect the order of succession." What does this amount to? That an irritancy of an act of sale does not by implication, amount to an irritancy of an act to alter the suc

cession, though, by an act of sale, the order of succession will be disturbed. But how does this shew that an irritancy of deeds of sale does not amount to an irritancy of selling, when a deed of sale is not merely an incident or consequence of selling, but the necessary and essential means by which the sale is to be effected?

The appellant again relies upon the observation of the same noble and learned Lord. "I take it to be clear, that if there be "two constructions open, one of which makes this clause against "altering the succession a substantive, and the other only an "auxiliary clause, one of which makes it a complete and sepa- "rate fetter, and the other makes it not a complete and separate "fetter — you are bound, by the principles of the Scotch law "of entail, to prefer that construction which is in favour of the "freedom of the heir." I entirely accede to this doctrine; but before the appellant can take advantage of it, he must shew that there are two constructions of the irritant clause open, which are equally consistent with the grammatical, natural, and usual meaning of the language employed, and that one of these leaves him free; but this he cannot do, without shewing that the execution of a deed of sale would not be a contravention of a prohibition against selling.

Lord Brougham, in giving an opinion against the sufficiency of the irritant clause in Lang *v.* Lang, expressly assigns as his reason, the introduction of the word "such," which limited the deeds irritated to the particular class of deeds which had been just before described, but suggested, that if the clause had been as here, without any such restriction, it would have been sufficient.

The Hoddam case (Sharp *v.* Sharp, 1 *Sh.* and *M'L.* 622) was likewise frequently referred to on behalf of the appellant; but really it has no application, for there an omission in a deed of entail having occurred from a clerical mistake, this House merely

refused to fill up the blank, by inserting words which would support the entail, when, according to the grammatical construction other words might as well have been introduced, which would have rendered it invalid.

I have thought it right to enter into the authorities so much in detail, from having reason to apprehend, that a notion has gone forth, that there is a difference between the Judges of the Court of Session and this House respecting the law of entail and that there is an expectation, that here, any objection to entails will be supported for the purpose of upsetting them. The recent decisions of your Lordships against particular deeds of entail, which have been brought before you, are, in my opinion, in entire conformity to the principles which have always guided the decisions of the House upon this subject, and have in no degree trenched upon the doctrine, that entails, with prohibitory, irritant, and resolutive clauses, aptly expressed, are to be supported. I would finally observe, that I see no ground for the insinuation, that the Judges of the Court of Session at present shew a disinclination to abide by the principles laid down by this House, in judging of the validity of entails; and I am clearly of opinion, that in deciding in favour of the validity of the present entail, they have entirely conformed to the decisions of this House, and the opinions expressed by the noble and learned Lords who advised the House when those decisions were pronounced.

I must therefore humbly move your Lordships, that the interlocutor appealed from be affirmed with costs.

Lord Brougham. — My Lords, I entirely concur with my noble and learned friend in the opinion he has expressed, and I know that it is also the opinion of my noble and learned friend who has left the house on public business, (*The Lord Chancellor.*) My Lords, an observation that was made, and a good deal pressed upon us at the bar — once and again urged upon your

attention — was, that the Court below had of late shewn a very great disposition to hanker after certain doctrines which have been rejected and repudiated in this House, and had not shewn a becoming and fitting conformity in their course of decisions, with the principles upon which this House had proceeded in dealing with questions of Scotch law of real property, and particularly the entail law.

The urging of that observation once and again at the bar, naturally led me, as it was my duty, and it has led my noble and learned friend to a very accurate examination of the grounds upon which it was supposed to rest; and upon looking at those decisions of the Scotch Courts, and the opinions expressed by the learned Judges, so far as we have any note of them, which is not in every instance very ample or very minute, I was completely led to come to the conclusion which my noble and learned friend has arrived at, upon an examination both of what has been said and decided below, and of what has been decided and said here, that there was no foundation at all for the remark — which I rejoice to find.

My Lords, when the opinion of a court, as embodied in its decisions, is dealt with, in examining how far it shall be followed in any subsequent case that comes before the court, or when the dictum of a judge, or of the judges of a court in any case, is dealt with, with a similar view and for a like purpose, common justice, and fairness, and candour, towards the court or the individual judge, and common sense and right understanding of the duty of persons called upon to apply the case or the dictum, teaches the propriety of taking both the one and the other in their connection with the case before the court, and with the facts upon which the individual judge is delivering himself; and still more does common fairness and common sense require, that these dicta and decisions must be taken all together. The whole matter said, and the whole matter determined, must be taken,

and you must not snatch at particular portions, and then form conclusions from them. That would be a course of the greatest unfairness, and also lead to the greatest error.

Now, if you take the opinions that were delivered by my noble and learned friend near me, and myself, which have been relied upon — if you take them all together, I will take upon myself to say, that nothing can be more accurate than the statements of my noble and learned friend, who has most fully and accurately, by going into the cases in detail, shewn, that there is no discrepancy whatever between those decisions, or those dicta, where they are merely dicta in the course of the argument, whereupon the decision was moved, and either the Scotch law of entail rightly understood, or the recent decisions of the Court of Session.

In Lang *v.* Lang, for instance, the word "such" is the very pivot, the cardinal point upon which the case turned; it is the hinge of the case, it is the word of reference, which of necessity qualifies the word "deeds," or "acts," by referring to what preceded, by shewing that it was not all acts or all deeds, but *such* deeds, namely, deeds antecedent. So, with regard to the word "which" in another case, I think it is in the Blair-Adam case, in which the construction is confined to leases, it clearly appears, that that word "which" was a word of reference altogether, and of limited construction. Other instances might be given, — for instance the case of *leases* was shewn clearly to be excepted in one case, because the prohibition had been levelled against that which was feudal, and did not apply to any thing which was not of that nature.

My Lords, reference has been made to the Hoddam case. I marvel on what ground, for I think they might as well have referred to Shelley's case, or to any other case in the law, as to the Hoddam case, (Sharpe *v.* Sharpe,) and for this obvious reason, as my noble and learned friend has pointed out: that

case was very well considered; it was twice argued, first before the Lord Chief Justice of the King's Bench, who sat by himself, and afterwards before myself, and I gave the judgment very elaborately. It was a nearly unanimous decision in the Court below upon a question of feudal law; it was thoroughly considered. That it was an omission, no one could doubt. It was an omission of a line in copying the instrument; just as we had a case here of Langston *v.* Langston, upon an English marriage settlement, in which there had been an omission of a line — they had omitted "first son," and included every other son. The first son had been tied up in the first line. Then we came to the second, third, fourth, and every other son, and there was no doubt that the first was intended to be included. But if it had been without the general words, the omission in Langston *v.* Langston would have been fatal, there can be no doubt. It was argued in the Hoddam case, that there could be no doubt of the intention of the party. There is never any doubt. No man means to make a bad entail, an entail with insufficient and inoperative fetters; every body knows what his intention is. But the intention is not sufficient; he must carry it into effect; he must execute his intention, and execute it validly. How that case of Sharpe *v.* Sharpe can have the slightest effect upon the present, or any connection with it, I am at a loss to know.

My Lords, I quite agree with my noble and learned friend, that it is perfectly certain, that where there are two constructions equal, not where one is more according to the grammatical sense and the right construction, and the other less according to that grammatical sense and the right construction, but where you cannot easily distinguish between the two, you naturally cast the balance upon that side which is against fetters, and in favour of liberty. That was wanting here, and that was the great defect in the case, consequently that principle will not apply.

Then it is also argued, that generally speaking, entails are

strictissimi juris. That is as old as the law of entail; but who ever heard it said, that there is no possibility of making a good and valid entail? Nobody says that. On the contrary, the law says you may make a valid entail, but you must take care to leave no holes in it; you must take care to leave it all fenced; you must have the *habendum* fenced by irritancies and resolutions, as well as prohibitions. If you do so fence it, you may make an entail by the law of Scotland just as strict as by the law of England; aye and a good deal longer; you may make it almost for ever, perpetuities being favoured by the Scotch law. But in order to do that, you must bring yourself within the law, you must comply with the requisitions of the act of 1685, as to framing the deed, and recording it in the register of taillies; taking that act according to the constructions which judicial authorities have put upon it; for, as Lord Eldon well said once and again, if you were to gather the Scotch law of entail only from the entail act, you would find a great deal deficient, which nobody would ever think of, from merely reading that act.

There are no particular technical words necessary to constitute an entail, but such words must be used, as clearly shew the intention executed of the entailer, to prohibit, to irritate, and to resolve; to make the prohibition, to make the act of contravention void and null, and to make the contravener forfeit for what he has done. If that is done sufficiently, either by enumeration of particulars, or by words of general reference, not shewn to be followed by enumeration, which qualifies and particularizes those general words, and takes away from their effect of generality, and which enumeration of particulars, is itself defective, but by a full and complete enumeration, or by general words, which do not make enumeration necessary,—in all, or either of those ways, or in any other way in which, either by distinct, clear, and indubitable reference, (but it must be indubitable reference,) or by particular and direct statement, — in any of those ways and

without any style being required, real property may be entailed.

Now, my Lords, one word more generally, with reference to the manner in which the decisions of this House upon such questions of Scotch Law have been regarded in the Scotch Courts. The Scotch Courts deserve the greatest credit for the fairness and candour, and the self-denial, I may add, which they have shewn in receiving with deference the authority of this House upon such questions, even where they corrected errors which had been fallen into by all the Scotch Courts. There are two ways of receiving that authority. The one is by yielding a mere bare naked obedience — that they must do. But there is another way of receiving that authority — and that they have adopted; they have not satisfied themselves with the first method; they have obeyed cheerfully. I will venture to say, there never was a more complete reversal of a decision of any Scotch Court, than Lord Mansfield's reversal in the famous Duntreath case, and no Scotch lawyer ever objected to that; if he did, I never heard of it; it has been universally, for the best part of a century, adopted as the rule, and I may almost add, the fundamental rule, of the Scotch law, and that was decided by a very eminent Scotchman indeed, but not a Scotch lawyer, for it is a great mistake to suppose that Lord Mansfield ever practised at the Scotch bar; if he did, he practised when he was three years old, because he left Scotland at that age. He practised very much in the Court of appeal here, as Mr Murray, and as Solicitor-General, and yet his decision has uniformly been submitted to as correcting a plain error into which the Scotch Courts had fallen. Lord Eldon has reversed decisions in the same way, and his decisions have been always acquiesced in. Even that which was reckoned the most doubtful, upon the Queensberry leases, has been always cheerfully acquiesced in, and I never heard one word said by any of the Scotch Judges,

— with many of whom I have the happiness to live on terms of intimacy, and to correspond with on subjects of Scotch law — I never heard them complain at all of the reversal of decisions of the Court below in this House; but they have yielded not only obedience, but respectful and cheerful obedience; holding that we have come to a right decision; and except in one case, that of the Queensberry leases, I never heard of any case in which any reluctance has been shewn to adopt our decision.

My Lords, I have thought it my duty to state these circumstances, because a great deal was said in the course of the argument upon this topic, and I hope that it will not be a topic hereafter alluded to. It is rather a painful thing to hear it said, when it is without foundation.

My Lords, I entirely concur in the motion of my noble and learned friend, that your Lordships should affirm this judgment, of course, with costs. My noble and learned friend, Lord Cottenham, was not here during the argument, and the Lord Chancellor entirely concurs in this view of the subject.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed, with costs.

G. and T. W. WEBSTER—JOHNSTON, FARQUHAR, and LEACH, Agents.

[*3d March*, 1843.]

GILBERT O. GARDNER, Esq., *Appellant.*

JOHN SCOTT and others, *Respondents.*

Superior and Vassal.—If, under a disposition with an alternative manner of holding, the disponee take a base infeftment,—a subsequent conveyance of the mid-superiority so created, and a confirmation thereof by the superior, will operate a mid-impediment to the vassal obtaining a charter from the superior so as to make his holding public.

Warrandice.—*Prescription.*—If lands be conveyed in warrandice of a disposition of other lands with a double manner of holding, under which the disponee takes a base infeftment,—should the mid-superior convey the mid-superiority, and the disponee of the mid-superiority obtain a charter from the superior, this will operate as an eviction of warrandice, upon which prescription will run against the original disponee of the dominium title.

Titles—*Boundary.*—A description of lands held to be demonstrative, not taxative.

ON 28th February, 1737, James Wylie disponed to Gavin Lawson, in liferent, and James Lawson, his son, in fee, "All and "haill mine, the said James Wylie's, fourth part and portion of "the lands of Shawtonhill, called Lochquarter, presently possessed by Robert Semple, with houses, biggings, yards, and "haill pertinents, lying in the parish," &c. The Lawsons were infeft upon this disposition, and their infeftment was recorded.

On 9th November, 1758, James Lawson disponed to John Hamilton, all and haill his "fourth part and portion of the lands of "Shawtonhill, called Lochquarter, as the same are now possessed "by James Thomson, with houses," &c. Hamilton was infeft

on this disposition in January, 1759, and his infeftment was recorded.

On 6th October, 1768, John Hamilton disponed to his son John, the "fourth part and portion of the lands of Shawtonhill, "called Lochquarter, with houses," &c. according to the statement of the appellant, "as the same was some time possessed by "James Thomson, and thereafter by James Russell;" but according to the statement of the respondents, "as the same was "lately possessed by James Thomson, and all in the same way "and manner as the said John Hamilton had right thereto by "disposition in his favour by James Lawson.

On 12th January, 1773, John Hamilton the younger obtained a charter of confirmation of these titles from Dame Helen Murray, the superior of the lands, declaring, that the lands were to be holden of the granter in feu-farm.

After an intermediate conveyance by John Hamilton the younger, to his brother William, and a reconveyance back to him by William, John, on 22d March, 1827, disponed to Smith, as trustee for his creditors, "all and haill the said fourth "part and portion of the lands of Shawtonhill, called Loch-"quarter." On this conveyance, Smith was infeft, and his infeftment was recorded.

On 4th December, 1828, Smith disponed the lands to the appellant, who was infeft on 6th January, 1829, and his infeftment was recorded.

On the 14th October, 1836, the appellant obtained a charter from the Duke of Hamilton, who had acquired the superiority, of "all and whole the fourth part and portion of the lands of "Shawtonhill, called Lochquarter, with the houses, &c. and "haill pertinents thereof, as possessed by Robert Semple, and "thereafter by James Thomson and James Russell, tenants "therein, and which were acquired by the deceased John "Hamilton from James Lawson, conform to disposition granted

" by the said James Lawson in his favour, dated 9th of Novem-
" ber, 1758."

This was the title of the appellant. That of the respondents was as follows: —

On 21st May, 1755, James Lawson disponed to John Scott, " all and haill these my sixteen acres of arable land, or thereby, " with mish and meadow belonging thereto, being part and por-
" tion of my lands of Shawtonhill, called Lochquarter, as the " same is presently marched and meithed, occupied and pos-
" sessed, by the said John Scott." And in real warrandice of this conveyance, Lawson disponed to Scott, " all and whole my " haill fourth part and portion of the lands of Shawtonhill, called " Lochquarter, some time possessed by Robert Semple." The disposition contained an obligation to infeft, *a me vel de me*, " the " one holding being without prejudice of the other," procuratory and precept, and an obligation upon the disponee, to relieve the disponer of L.3 Scots, " as a proportional part effeiring to " the said lands, of the feu-duty, teind, and other public burdens, " affecting the said lands of Lochquarter." Scott executed the precept in this disposition, by taking a base infeftment under Lawson the disponer. John Scott possessed upon this title until his death.

In February, 1773, James Scott, the son of John, obtained from John Hamilton the younger a precept of *clare constat*, for infefting him, as the heir of his father, in the lands conveyed to his father by Lawson's disposition of 1755, and took infeftment in virtue of the precept. He then paid Hamilton the feu-duty and other burdens stipulated in the *reddendo* of the disposition to his father, and continued to do so until the year 1828, when Hamilton became divested of the superiority under his bankruptcy.

On 14th November, 1832, James Scott disponed the sixteen

acres so held by him to Robert Thomson, who was infeft on 13th December, 1832. In the disposition to Thomson, there was an obligation to infeft by double manner of holding. On 6th March, 1833, Thomson reconveyed to James Scott in fee, and Marion, his wife, in liferent, by disposition, containing a double manner of holding. Upon this conveyance the disponees were infeft; and on 26th March, 1833, James and Marion Scott conveyed to John Scott in fee, burdened with the liferent of Marion, by disposition, containing a double manner of holding. And upon this conveyance John was infeft.

In a process of locality of the parish in which the lands in question were situated, in which a discussion arose between the appellant, on the one hand, and the common agent, James Scott, on the other, as to the stipend allocated *in cumulo* upon the lands held by the appellant and Scott, John Scott entered appearance, and in one of his pleadings, stated, that the stipend consisted of old stipend which had always been paid by the appellant and his authors, as owners of the warrandice lands, and "as "superiors of the respondent's sixteen acres."

James Scott died, and the appellant then required John Scott to take an entry with him as superior. This being refused, the appellant brought action of reduction of Scott's titles, with an alternative conclusion for declarator of non-entry in case a good title should be exhibited.

John Scott pleaded in defence, a denial that the appellant was his superior, inasmuch as the titles shewed that the lands conveyed in 1758 to Hamilton, the appellant's author, were limited to those "possessed by James Thomson," and could not include the lands conveyed to John Scott in 1755, described as "possessed by John Scott" himself. That the recognition by his, John Scott's, author of the authors of the appellant, as their superiors, had arisen from mistake, and that he was entitled,

under the assignation, to writs and evidents in his titles, to take up the procuratory of resignation in the disposition of 1755, and enter with the chief superior, the Duke of Hamilton.

The Lord Ordinary ordered cases by the parties, and thereafter, on 24th May, 1839, pronounced the following interlocutor: —"The Lord Ordinary having heard counsel in this cause, and "thereafter considered the record, cases, title-deeds produced, "and whole process, Finds, that John Smith" (Scott) "the "defender's predecessor, acquired the property now held by "him, (being sixteen acres of the lands of Lochquarter,) from "James Lawson, a predecessor of the pursuer, by disposition, "dated 21st May, 1755, containing both procuratory of resignation and precept of sasine, entitling the disponee and his "successors to hold the lands either *a me, vel de me*, it being "expressly declared as usual, that the one holding should be "without prejudice to the other: Finds, that the said John "Scott having been infeft base on the said disposition, possessed "the lands till his death, without taking any other steps to complete his title: Finds, that on the death of the said John Scott, "his son, James Scott, in 1773, obtained a precept of *clare constat* from John Hamilton, another predecessor of the pursuers, "who had acquired the remaining part of the lands of Lochquarter from Lawson, and held himself out, or was understood "to be then mid-superior of Scott's said portion thereof: Finds, "that the said property originally sold to Scott has passed "through various other hands since 1773, although no other "title has been made up under the mid-superior, except by the "said precept of *clare constat:* Finds, that by the original disposition by Lawson to Scott, the latter and his successors are "taken bound to free and relieve the disponer of three pounds "Scots per annum, as a proportional part of the *cumulo* feu-duty "effeiring to the whole lands called Lochquarter, which portion "of feu-duty Scott and his successors paid to Lawson, Hamilton,

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" and the pursuer, successively, down to a period recently ante-
" rior to the raising of this action, leaving them to settle for the
" same with the over-superior: Finds, under the state of the
" titles exhibited in this action, that the present defender, as a
" successor of James Scott, the original purchaser, is now en-
" titled, in virtue of the assignation of writs in the successive
" conveyances of the said property, to take up the unexecuted
" procuratory of resignation contained in the said conveyance by
" Lawson, the common author both of defender and pursuer, to
" the said James Scott; and that the pursuer is not entitled, any
" more than his author Lawson would have been entitled, to
" compel the defender to continue to hold under and take an
" entry from him, when the defender has intimated that he pre-
" fers to hold *a me*: Therefore, sustains the defences, assoilzies
" the defender, and decerns; reserving to the pursuer to claim
" relief from the defender, as accords, of the portion of the feu-
" duty payable to the over-superior for the portion of the origi-
" nal property alienated by Lawson, to the said James Scott, in
" terms of the burden contained in the original conveyance:
" Finds the defender entitled to expenses, subject to modifica-
" tion; and, in the meantime, allows an account of the expenses
" to be given in, and remits the same, when lodged, to the
" auditor to tax and report.

" *Note.*— Had the merits of this case depended solely on the first
" plea urged for the defender, the Lord Ordinary would have great
" doubt of it. It was pleaded that the pursuer had not a proper
" connected title to the superiority (or rather mid-superiority) of
" the defender's land, as it was said that James Lawson, the common
" author of both parties, only gave a conveyance to John Hamilton
" (subsequent to the sale to Scott) of the lands of Lochquarter, as
" then possessed by James Thomson, which it is said excluded Scott's
" portion, which was then possessed by himself. There would have
" been very great weight in this plea, had not Scott's son taken an

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" entry, in 1773, from Hamilton, and paid him and his successors the " portion of the general feu-duty for a long tract of years afterwards. " In this view, when the whole lands of Lochquarter were conveyed " to Hamilton, it is rather thought that the reference to Thomson's " possession must be held as merely descriptive, and not as taxative; " and the Lord Ordinary, after such a lapse of time, can hardly go " into the defender's notion that the precept of *clare constat* in 1773 " was taken by Scott's son from Lawson by mistake.

" But, even assuming Lawson to have conveyed to Hamilton the " temporary mid-superiority constituted over Scott's part of Loch- " quarter by the base infeftment of the original disponee, and the " precept of *clare constat* taken by his son, and that this mid-superio- " rity has descended to the present pursuer, the question remains, " whether, in the state of the defender's title as produced, the pur- " suer can force the defender, and all his successors, to continue to " enter with him? As demonstrated in the interlocutor, the defen- " der holds a title from Lawson, the common author of both parties, " with procuratory and precept, entitling him to a double manner of " holding, and when the pursuer insists, in this action, that the de- " fender (and of course all his successors *in perpetuum*) must enter " with him, it can only be on the assumption that the defender has " lost the option of going to the over-superior, given to his author by " Lawson's conveyance of 1755. The Lord Ordinary, however, has " from the first viewed that as a very startling proposition in the " law of title, and he conceives it to be alike contrary to the clearest " and best recognized principles of feudal law. When a party gets a " conveyance from another, with procuratory and precept contained " in the same deed, and when possession is taken and maintained on " that deed, the faculty, or privilege of using the procuratory, never " lapses by prescription or otherwise; the procuratory, while unexe- " cuted, passes under the successive assignations of writs contained " in each conveyance of the property; and many instances have " occurred in practice, in which procuratories, when it was expedient " to use them to confer a proprietary title, have been used at the " distance of a century.

" In this view, the Lord Ordinary thought it material to ask the

" pursuer at the debate to explain what was the precise legal ground " on which he contended that the Scotts had lost the faculty or " option of a double holding, contained in the original conveyance. " This question is now attempted to be answered in the pursuer's " revised case. In one branch of his argument, he seems to contend " that the defender's predecessor, by entering with the pursuer's " predecessor, in 1773, had made his election, and chosen for " ever to hold base under the mid-superior; and, in another view, " he seems to maintain that the option of using the procuratory is " now lost by prescription, in consequence of the elapse of sixty-six " years since the date of the precept of *clare constat*. But the idea " of the disponee ever having made, or of his having been obliged or " presumed to have made, any election in this matter, to be final and " conclusive against his use of the procuratory, is not only a new and " unauthorized proposition in conveyancing, but seems to be contrary " to the plainest meaning and object of the deed giving the option of " double holdings in this and in the innumerable cases of the same " description which occur in practice. The alternative holding was " notoriously introduced to save the rights of parties from being " affected by want of confirmation, till it was convenient for a disponee " to go to the over-lord; it was a form of right by which a purchaser " could hold under the seller and his heirs, so long as he chose, and " then go to the over-superior when he wished to hold directly under " him. The lower right is given without prejudice to the higher; " and the disponee, instead of being limited to one only of the modes " of holding, was entitled to adopt the one after the other, as suited " his convenience.

" As little is there any room for the plea of prescription. On the " contrary, when it is considered that the procuratory of resignation " is a mere faculty or privilege, contained in a feudal progress, it " would be contrary to every principle of law to hold that it could " prescribe by any lapse of time. It would be a hazardous position, " indeed, to maintain that any clause or right could be lost by pre- " scription which was contained in the very deed on which a pro- " prietor was possessing his estate.

" If, however, the procuratory of resignation be still executable by

" the defender, it seems to put an end to the present action. If the " defender be still entitled to enter with the over-superior, he cannot " be forced to enter with the pursuer. Indeed, the relative obliga- " tions between mid-superiors and sub-vassals who have a double- " holding, are peculiar; the continuance of the relation on both sides " is voluntary, and has long been so regarded in law. Accordingly, " in one well known case, where a seller had alienated an estate with " procuratory and precept, the heir of the seller was found not " obliged to make up any title to enable him to give an entry to the " purchaser's heir, who had taken a base infeftment. (See case of " Dundas, 1769, *Morr.* p. 15035.) And if the pursuer had not had " occasion to complete a title here, in respect of his right to the " other parts of Lochquarter he certainly could not have been com- " pelled to take up this mid-superiority, to give an entry to the " defender.

" The pursuer asked how the infeftment of Scott, jun. on the " precept of *clare constat* in 1773, could be extinguished on the " record, if the defender does not take the entry now required, to " which it is obvious to answer, that when the present defender " executes the procuratory of resignation, and gets a charter from " the over-superior, he can grant a precept of *clare* in his own favour, " and resign *ad remanentiam*. This, too, is obviously the best title " for the defender to expede.

" The pursuer seems mainly to rely on certain *dicta* in the opinion " of the Judges in the case of Cheyne against Thomson, in the " Second Division, in 1832, (10 *Shaw*, p. 622,) and particularly on " the opinion of Lord Cringletie, which was contrary to the rest of " the Court, as supporting his right to insist on the defender con- " tinuing his vassal. But the Lord Ordinary views the principles " laid down by the great majority of the Court, in that case, as " decidedly favourable to the defender's plea. The majority of their " Lordships considered the option given to a purchaser like Scott, " as *res meræ facultatis*, not prescribable; and they expressly laid it " down that such a faculty was not lost *non utendo*. It is true that " the heir of the party base infeft in that case never took any charter ' or precept of *clare constat* from the seller or his disponee; and

" although one of the Judges, (Lord Justice Clerk,) certainly noticed " that circumstance in his opinion, he gave no opinion what effect or " consequence would have followed from such an entry, if it had been " taken out by the purchaser, because there was no occasion to " anticipate that question, which was not then before the Court. " The Lord Ordinary thinks, that the very granting of that precept. " by one of the pursuer's predecessors, strengthened the obligation " on him to homologate and give effect to the procuratory when the " purchaser's successors chose to use it, as the precept of *clare con-* " *stat* was a recognition and homologation of the original right given " to Scott in all its points, and consequently *inter alia* of the procura- " tory of resignation therein contained.

" Similar arguments used to arise of old, when there was a doubt " whether the vassals of church lands could go to the Crown for an " entry under the clause in the acts of annexation declaring these lands " to hold of the Crown, if they had nevertheless taken a charter from " the lord of erection subsequent to the annexation. Even in that " peculiar case it required an express statute, 1661, c. 53, to prevent " the vassal from going to the Crown; but the option of using the " procuratory in such a case as the present seems to have been all " along admitted by old lawyers. In the argument in the case of " Heriot's Hospital against Hepburn, in 1714, *Morr.* p. 7988-7996-7, " this was conceded on both sides.

" These are the views on which the Lord Ordinary has decided " this case. He proposes to give the defender the greater part of his " expenses, because he not only thinks the case a clear one, even on " the defender's title, (as explained from the first in the defences,) " but because, where a feuar holding a property only of a few acres " is brought into the Supreme Court on such a question, it would be " ruin to him if he did not get his costs. But it is necessary that " that part of the expenses incurred by the defender's denial of the " pursuer's title should be deducted, as it is thought that the defender " was wrong in that plea."

A reclaiming note was presented against this interlocutor, on the 6th of December, 1839, and, on advising it, the Court pro-

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nounced the following interlocutor: — "The Lords having "advised this cause, and heard counsel for the parties, adhere "to the interlocutor reclaimed against, and refuse the desire of "the reclaiming note; find additional expenses due; and remit "to the auditor to tax the account thereof, and to report."

Against these interlocutors the appeal was taken; and as the defenders in the Court below did not support the judgment of the Court below, either in printed cases, or by appearance at the bar, the appeal was heard *ex parte*.

Pemberton, and E. S. Gordon, for appellant. — I. The first question is the construction of the title-deeds, — Whether the description, in the original conveyance to the appellant's authors, is to be held to be taxative, as considered by some of the Judges below, or merely demonstrative, as held by others of the Judges. The claim of the appellant is not to the *dominium utile* of the lands, but to the mid-superiority only, and this, it is admitted, he and his authors have possessed since the year 1773 downwards. The mere mention, in the conveyance to Scott, in 1775, of his possession or occupation of the lands, cannot, therefore, have any relevancy; for a party possessing, for forty years, under a title, with parts and pertinents, cannot be affected by a title in another, who has not had possession, *Stair*, ii. 3, 73; Leven *v.* Finlay, *Mor.* 10816; Magistrates of Perth, 8 *S.* and *D.* 82; Cumming *v.* Fyfe, 8 *S.* and *D.* 326; and confessedly the mid-superiority, has not been enjoyed by any other party. A mere reference to possession will not make the description taxative; for this purpose there must be reference to specific marches and boundaries, *Stair*, ii. 3, 26; *Ersk.* ii. 6, 6; Uve *v.* Anderson, 12 *S.* and *D.* 494, where a mention of specific measurement was disregarded, and the description of boundary alone looked to, although the measurement was more clearly ascertainable than the boundaries.

[*Lord Chancellor.* — In that case the marches were very precise, I suppose?]

Yes.

[*Lord Chancellor.* — Don't say, or thereabouts?]

No.

[Then the party could not go out of the boundary because of any words?]

Exactly. — And the Court preferred the boundary to the measurement.

[*Lord Chancellor.* — The measurement, in such a case, must be construed "more or less?"

Lord Campbell. — The question is, Whether, under a title in the appellant, which might include the whole lands, words in another party's title will be admitted to limit the title of the appellant. If the title, *ex facie*, may be enough, I should, as at present advised, hold it to be enough, where the possession confirms it.]

II. But second, the respondent says, that admitting him to have held, under the appellant and his authors, as mid-superiors, since 1773, his titles give him an alternative manner of holding, and this being *res merae facultatis*, does not prescribe, and it is open to him, at any time, to revert to the procuratory in the disposition of 1775, and elect to hold of the superior lord.

[*Lord Brougham.* — Do you contend that the vassal must elect once for all?]

No. He may elect, *toties quoties*, so long as there is no mid-impediment. In this case there are several objections to the vassal so doing: — 1. It is assumed by the Lord Ordinary, that the respondents have a right to the procuratory; but they have not averred on the record, or produced evidence to shew that their titles contain any assignation of writs, so as to carry the procuratory of resignation in the disposition of 1755. 2. Even

if the respondent's title do contain assignation of writs, this would not vest in them the right which the original disponee, John Scott, had to take up the mid-superiority, previously existing in Lawson. When John Scott died, his son, James Scott, did not expede a general service, which could alone have carried to him this personal right, but he entered by precept of *clare constat*, which had not any efficacy to transmit such a right. The personal right, therefore, in John Scott, to take up the procuratory in the disposition of 1755, is still *in hæreditate jacente* of him. Moreover, if the right to the procuratory were in the respondents, it has never been exercised so as to make a title to the mid-superiority, but it is only when their title has assumed this form that it could be an answer to this action. 3. The infeftment taken by Scott upon the disposition by Lawson in 1755, was a base infeftment, until confirmed by the superior, which it never was. A right of mid-superiority, then, was vested in Lawson, and was in him, was carried by his disposition to Hamilton, in 1758, and was fully established in the person of Hamilton by the charter of confirmation in 1773. This charter, and the infeftment upon it, opposed a mid-impediment to Scott establishing, in his person, the right to the mid-superiority, by executing the procuratory in the disposition of 1755. 4. Whether the title to the mid-superiority thus vested in Hamilton, was or not liable to objection originally, it is now fortified beyond challenge by possession for more than forty years. It is admitted, by some of the Judges in the Court below, that the charter of confirmation in 1773 operated a mid-impediment; but they deny effect to the prescriptive possession, because of the conveyance of lands in warrandice, by the disposition 1755, holding that there was no eviction until this action was raised. But, 1*st*, There is nothing on record, or in evidence, to shew that the respondents are in right of the warrandice lands, without which they cannot have any right to found on the conveyance as barring prescrip-

tion, Hamilton *v.* Montgomerie, 12 *S.* and *D.* 353, otherwise successors in the warrandice lands could not have any knowledge from the record of the liability to which they are subject. *2d*, If the charter of 1773 operated as mid-impediment, it did so as an eviction, and the right to recur to the conveyance in warrandice then emerged. It is a manifest contradiction to hold that these could be cut off by a mid-impediment created in 1773, but that no eviction of the right warranted occurred till 1836, the date of bringing this action. Possession, in virtue of an inconsistent right, is eviction, Burnet *v.* Johnston, *Mor.* 16586; Hepburn *v.* Buccleugh, *Mor.* 16617.

[*Lord Chancellor.* — If Scott, in 1774, had wished to avail himself of the warrandice, how could he have accomplished it?]

By compelling Hamilton by action to resign in the hands of the superior in favour of himself.

[*Lord Chancellor.* — Was the warrandice argued at the bar in the Court below?]

It was not raised before the Lord Ordinary at all; but a hint was thrown out in the course of the argument before the Court, but counsel did not come prepared to argue it.

LORD CHANCELLOR. — James Lawson was proprietor of a fourth part of the lands of Shawtonhill, called Lochquarter; and in the year 1755, he disposed a part thereof to John Scott, by this description, — "all and haill those my sixteen acres of land, or "thereby, being part of my lands of Shawtonhill, called Loch-"quarter, as the same is presently marched and meitted, "occupied and possessed, by the said John Scott."

The disposition contained an obligation to infeft by a double manner of holding, *a me vel de me*, in the common form, a procuratory of resignation, and precept of seisin; and an engagement to relieve the granter of the sum of L.3 Scots of feu-duty, as the proportional part of the *cumulo* feu-duty effeiring

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to these lands. Scott took infeftment on the precept in this disposition.

About three years afterwards, namely, in 1758, Lawson disponed to John Hamilton, "all and haill his fourth part of the lands "of Shawtonhill, called Lochquarter," as the same were then possessed by James Thomson. Hamilton was infeft in 1759. The present action was brought by Gardner, in whom Hamilton's estate had become vested, against John Scott, the grandson of the original disponee of the sixteen acres, to compel an entry from him, as singular successor, and payment of the usual composition of a year's rent.

The first question in this case is, whether the mid-superiority of the sixteen acres passed to Hamilton under the above disposition to him from Lawson? I agree with the Lord Ordinary, that if the question had arisen recently after the disposition, and there had been no collateral circumstances to shew what was included in it, and to what it extended, it might have been difficult to say that the mid-superiority of the sixteen acres passed by this conveyance. But in 1773, James Scott, the only party interested in disputing Hamilton's title, was infeft on a precept of *clare constat* from Hamilton, and thereby acknowledged his title to the superiority, paying him the feu-duty of L.3, the proportion stipulated in the original disposition to John Scott; and this payment has been continued down to the commencement of the present suit, a period of more than sixty years.

A farther acknowledgment of the right took place in 1824, in a process of locality then depending, in which it was contended by John Scott, the son of James, and the then owner of the sixteen acres, that Gardner, whose title was deduced from Hamilton, was the superior of the sixteen acres held by Scott. This formal acknowledgment of the title for so many years by the proprietors of the sixteen acres, compels me to read the

words "all and haill his lands, &c. as the same were then "possessed by James Thomson," as merely descriptive or demonstrative, (a sense which I think they will bear,) and not as taxative, or defining precisely the limits of the disposition.

If this be so, the next question is as to the effect of the confirmation of Hamilton's title by the over-lord. It is not disputed, that under a disposition to hold *a me vel de me*, the disponee may, at any time, elect to hold of the superior, and apply for a confirmation of his title. This right is *meræ facultatis*, and is not barred by time. But in a case like the present, where the mid-superiority is disponed to another, and the disponee is infeft by the over-lord, a *medium impedimentum* is created, which must be removed, by reduction or otherwise, before this right can be exercised; and if this state of things be acquiesced in, and the party do not vindicate his right, he may be barred by prescription. The acquiescence in this case has been for a period more than sufficient for that purpose, and there is therefore, I think, subject to the next question, an end of the claim.

The remaining question relates to the effect of the warrandice. The disposition by Lawson to Scott conveyed "all and haill "his fourth part of the lands of Shawtonhill, &c. in real war-"randice of the sixteen acres." It is argued, that this warrandice is still in force, and that, as the pursuer is in possession of the warrandice lands, he cannot enforce his present claim against the defenders, because, if successful, he would be bound to indemnify the parties by reason of the warrandice; and that to prevent this circuity, the law interposes in the first instance. The question, therefore, is, whether the warrandice be still in force? or whether this also is barred by prescription? This depends upon the point whether there has been any eviction in this case, and if so, at what time; for by the statute of 1617, the period of prescription runs from eviction. Some of the learned Judges

in the Court of Session were of opinion, that the eviction in this case could not be considered as having commenced until the institution of the present suit.

But if, by the disposition of the mid-superiority to Hamilton, and the infeftment under that disposition, Scott was prevented from obtaining confirmation of his title, in the usual course, by the over-lord, I consider this to have been an eviction, and that the prescription would run from that period. It follows, therefore, that there is nothing to prevent the pursuer succeeding in his present suit. I recommend your Lordships, therefore, to reverse the judgment of the Court of Session.

Lord Campbell. — My Lords, I heard this case along with my noble and learned friend, and I entirely concur in the view of the case, which he has explained in such a very lucid and convincing manner. My Lords, I never entertained any doubt upon the first question, namely, as to the title of the pursuer. One of the learned Judges below says, that the two conveyances, the conveyance to Scott, and the conveyance to Hamilton, are exactly of the same sort, and that the words in both of them must be consid red demonstrative, not taxative, and that the same rule would apply to both. My Lords, there is no distinction between them, because, as regards the conveyance by Lawson to Scott, the subject matter of the conveyance is expressly confined to the sixteen acres in the possession of Scott; there are no words which would carry the grant beyond that portion of the land. But then, when you come to the conveyance to Hamilton, it is "all and haill" so and so in the possession of Thomson. The possession there may well be demonstrative, and there are words which would carry the whole, namely, the mid-superiority of the sixteen acres, as well as the residue of the lands. It seems to me, therefore, that at all events, it is quite clear, that this might be the foundation of a prescriptive right. Your Lordships are aware, that by the law of Scotland, unless there be a written

grant, adverse possession will not give a title; but if there be a grant which, upon the face of it, might carry the lands, then possession for a certain length of time is a sufficient evidence of title against all the world. Therefore, upon that point, I have never entertained the smallest doubt.

With respect to the effect of the deed of 1773, and Hamilton taking infeftment of the whole, and Scott, the son of the grantee, completing his title under Hamilton, it seems to me, that it was a consummated transaction at that time. If Hamilton was not entitled to the mid-superiority, and if the warrandice was to be resorted to, there was at that time an eviction, because, at that time, Hamilton takes a title to the whole, including the sixteen acres, from the superior under the Crown. Then, that was an eviction, and at that time Scott might have put his warrandice in force. But instead of doing that, what does he do? He completes his title to the sixteen acres under Hamilton, undertaking to pay him the L.3 a year, as the proportion of feu-duty in respect of the sixteen acres, and they have gone on for about sixty years paying the L.3. My Lords, after that, it seems to me, that it is utterly impossible to put that warrandice in force. The warrandice would have run in *sæculâ sæculorum*; there would have been no statutory limitation or prescription, whereby such a claim would be defeated.

Under these circumstances, it seems to me, that the pursuer was clearly entitled to treat the defender as his vassal, and to call upon him to enter under him, the pursuer, as his superior. Unfortunately, the respondent did not appear at the bar, which made us more cautious in considering the case, particularly as there was a great division of opinion among the Judges, and we felt ourselves under the necessity of reversing their interlocutor; but after having given the most anxious consideration to it, I consider, that the opinion expressed by my noble and learned friend is entirely in accordance with feudal principles we

established in the law of Scotland. I entirely concur in the view which Lord Fullerton takes of the case, in his most masterly judgment; and, under these circumstances, I have no hesitation whatever in concurring in the opinion expressed by my noble and learned friend.

Lord Brougham. — My Lords, in this case I entirely agree with my noble and learned friends who have addressed your Lordships. There was one small part of the argument which I did not hear. I, however, considered the case at the time, and have had some communication on the subject with the learned persons in question, and I entirely agree in the view taken by Lord Fullerton, and also in what my noble and learned friend has just said, as to the very satisfactory nature of his very masterly judgment. I entirely agree in the reasons given by my noble and learned friend on the woolsack. There was considerable difference of opinion in the Court below. I entertain no doubt that Lord Fullerton was right, and that the Court below came to a wrong decision, and that the judgment, therefore, must be reversed.

Mr Anderson. — My Lord, with regard to the costs, the Court of Session gave costs against us.

Lord Brougham. — You must have your costs below. We are giving the judgment they ought to have given. We not only reverse the judgment saddling your party with costs, but give you the costs.

Lord Chancellor. — The question is, what order ought to have been made below?

Lord Brougham. — Just so. We make the order which the Court below ought to have made.

Lord Campbell. — The Court below ought to have given costs.

Mr Anderson. — Your Lordships will decern in terms of the libel, and find the pursuer entitled to his costs.

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Lord Brougham. — The costs below.

Ordered and Adjudged, that the interlocutors complained of appeal be reversed. And it is farther ordered, that the defender, action in the Court of Session, (respondent here,) do pay or ca be paid to the pursuer in such action, (appellant here,) the costs proceedings incurred by the said pursuer in the said Court of Se and it is also farther ordered, that the cause be remitted back Court of Session, in Scotland, to do therein as shall be jus consistent with this judgment.

[Heard 7th *April* — Judgment 18th *August*, 1843.]

WILLIAM MONTGOMERIE and Others, *Defenders*,

JAMES DUNLOP, Trustees and Executors of the deceased William Patterson, *Suspenders*. } *Appellants.*

The RIGHT HONOURABLE ARCHIBALD MONTGOMERIE HAMILTON, Earl of Eglinton, } *Respondent.*

Tailzie. — Terms of deed *held* not to be a continuance of a previously existing investiture, but to form an original substantive entail.

Ibid. — *Held*, that possessing for forty years under a deed executed by an heir of an existing and valid tailzie, but in its terms being not a continuance of such existing investiture, but an original and substantive entail, would work off the fetters of the old entail; and *found*, that the heir possessing under such new entail, was entitled to sell the lands, in respect that it had not been recorded.

Ibid. — *Found*, that an heir of entail entitled to sell the lands, by reason of the entail not being recorded, is not bound to reinvest the price under the fetters of the entail.

Ibid. — Terms of resolutive clauses held not to be defective, by reason of defective enumeration of the acts to be resolved.

ON the 27th May, 1728, Hugh Montgomerie, under reservation of his own liferent, executed an entail of his lands of Lochliboside and Hartfield, the vicarage teinds of Skelmorlie Montgomerie, the ten pound land of Skelmorlie, and the lands of Ormsheugh, in favour of Sir Robert Montgomerie of Skelmurely, Baronet, " my nephew, in liferent, for his liferent use

" allenerly, and the heirs-male of his body; whilks failzeing, to " the eldest heir-female of the body of the said Sir Robert " Montgomerie, and the heirs-male of the body of the said " eldest heir-female; whilks failzeing, the next heir-female succes- " sive of the body of the said Sir Robert Montgomerie, and the " heirs-male of the body of the said next heir-female successive; " whilks failzeing, to Alexander Clark, son to the deceased Mr " James Clark, minister of the gospell at Glasgow, procreat be- " twixt him and Christine Montgomerie, his spouse, and my " sister, and the heirs-male of his body; whilks failzeing, to the " eldest heir-female of the body of the said Alexander Clark, " and the heirs-male of the body of the said eldest heir-female: " whilks failzeing, the next heir-female successive of the body " of the said Alexander Clark, and the heirs-male of the body " of the said next heir-female successive; whilks failzeing, to " any other heirs of tailzie, to be nominat and apointed by me, " by wryte under my hand, at any time in my life, in my *liege* " *poustie*; whilks also failzeing, to my own nearest lawful heirs " and assigneyes whatsomever, the eldest heir-female always " excluding all other heirs-portioners, and succeeding without " division in fee heritably:" This entail, which required the heirs to possess under it alone, and to use a certain sirname and arms, contained prohibitions against altering the order of succession, selling or contracting debt, which were fenced by irritant and resolutive clauses, and was duly recorded in February, 1735.

Sir Robert Montgomerie predeceased the entailer, without leaving any issue male, but leaving three daughters, of whom Lilias Montgomerie was the eldest.

The entailer died in 1735, and thereupon Lilias Montgomerie entered into possession of the entailed lands, and was infeft in them in August, 1735.

In 1757, Lilias Montgomerie procured an act of Parliament.

authorizing her to sell the lands of Lochliboside and Hartfield, This act proceeded on the recital, that the only heirs of entail then existing, were the children of Lilias Montgomerie, and her two sisters, then spinsters, Alexander Clark having died without issue; and that the lands of Lochliboside and Hartfield, were a a distance from the other entailed lands; and it directed that the price of these lands, when sold, should be invested in the purchase of lands contiguous to the other entailed lands, to be settled and provided "to and for the use, benefit, and behoof, of the said "Lilias Montgomerie, and the said other heirs of entail, accor- "ding to the different rights and interests, and in the same "order and course of succession, as the same premises are "secured to and for them and their benefit respectively, in "and by the said deed of entail, and subject to the restrictions "and limitations, clauses irritant and resolutive, therein con- "tained."

Under the powers of this act, the lands of Coilsfield, in the county of Ayr, were purchased from Alexander Montgomerie, the husband of Lilias Montgomerie. In November, 1757, Lilias Montgomerie and her husband joined in executing a deed, by which, professing to act in compliance with the act of Parliament, they disponed the newly acquired lands of Coilsfield, "to "and in favours of the said Lilias Montgomerie, my wife, who "is the eldest heir-female of the body of the said deceased Sir "Robert Montgomerie of Skelmorley, Baronet, and grand "niece of the said deceased Sir Hugh Montgomerie of Skel- "morley, Baronet, and to her heirs-male procreated, or to be "procreated, of her marriage with me, the said Alexander "Montgomerie; whom failing, to the heirs-male of the said "Lilias Montgomerie's body in any subsequent marriage; "whom failing, to the next heir-female successively of the "body of the said Sir Robert Montgomerie, and the heirs- "male of the body of the next heir-female successively; whom

" failing, to any other heirs of taillie, (if any be,) nominated and " appointed by the said deceased Sir Hugh Montgomerie, by " a writing under his hand, at any time of his life *in liege poustie*; " whom also failing, to the said deceased Sir Hugh Montgo- " merie, his own nearest lawful heirs and assignees whatsoever, " the eldest heir-female always excluding all other heirs-por- " tioners, and succeeding without division."

The prohibitions and fetters of this entail were the same, *mutatis mutandis*, with those of the original entail of 1728, to which reference was made at the outset of the prohibitions, in these terms: " but always with and under the provisions, re- " strictions, limitations, clauses irritant and resolutive, hereafter " specified allenarly, and no otherwise, which are contained in " the foresaid deed of entail of the said lands of Lochliboside " and Hartfield, executed by the said deceased Sir Hugh Mont- " gomerie, and referred to in the act of Parliament before recited, " namely, with this provision always, as it is by the aforesaid " taillie, and by these presents, expressly provided and declared:" and a similar reference was also made in these terms, in the condition requiring the use of the family sirname.

This entail was duly recorded on the 4th of January, 1758, and in June, 1771, Mrs Lilias Montgomerie completed her titles, and was infeft under it.

In June, 1774, Mrs Lilias Montgomerie, with consent of her husband, and under the designation of " eldest daughter and *heir* " of tailzie of the deceased Sir Robert Montgomerie," executed a deed, whereby, on the narrative of its being made " for certain " good and weighty causes and considerations, and with and " under the reservations after written, conceived in favours of " me, the said Lilias Montgomerie, and my said husband; and " also with and under the express reservations, provisions, con- " ditions, declarations, restrictions, limitations, and clauses irri- " tant and resolutive, after specified, allenarly and no otherwise

"which are hereby appointed to be inserted and contained in "the instruments of resignation, retours, charters, infeftments, "precepts, and sasines, and others to follow hereupon," she disponed in favour of "Hugh Montgomerie, Esq. my "eldest son, and heir of taillie, Captain in the 1st Regiment of "Foot, and the heirs-male of his body; whom failing, to the "other heirs-male of my body; whom failing, to the next heir-"female successive of the body of the said deceast Sir Robert "Montgomerie, my father, and the heirs-male of the body of the "said next heir-female successive; whom failing, to any other heirs "of taillie, (if any be,) nominated and appointed by the deceast "Sir Hugh Montgomerie of Skelmurelie, Baronet, by a write "under his hand, at any time in his life, *in liege poustie;* whom "also failing, to the said Sir Hugh Montgomerie's own nearest "lawful heirs and assignees whomsoever, the eldest heir-female "always excluding all other heirs-portioners, and succeeding "without division, in fee heritably," — the vicarage tiends of "Skelmurelie and Montgomerie, the ten pound land of old extent of Skelmorlie, the lands of Ormsheugh, "as also, all and whole these "parts and portions after mentioned of the lands and estate of "Coilsfield, which were sold and disponed by the said Alex-"ander Montgomerie, my husband, to me and my heirs of "taillie before mentioned, conform to disposition by him, with "consent therein mentioned, dated the 1st, 2d, and 4th, days "of November, 1757, and recorded in the register of taillies, "the 4th day of January, 1758, and that in lieu and place of "the lands of Lochliboside and Hartfield, part of the said "entailed estate of Skelmurelie, which were sold and disponed by "me, with consent of my said husband, in virtue of an act of "Parliament obtained by me for that purpose, in the 30th year "of his late Majesty's reign; namely," [Here followed a parti-cular description of the lands,] "reserving always to me, the "said Mrs Lilias Montgomerie, my liferent of the whole lands

" and heritages hereupon disponed, during all the days of m
" life; and reserving also to the said Alexander Montgomeri
" my husband, in case he shall happen to survive me, his life
" rent, during all the days of his life after my decease, of a
" and whole the said lands of Ormsheugh, possessed by th
" Earl of Eglinton, the forty-shilling land of Coilsfield, with th
" manor-place, houses, yards, and pertinents thereof, in th
" natural possession of the said Alexander Montgomerie, an
" these parts of the lands of Carngillan possessed by Joh
" Humphrey, which were disponed by me to my said husband
" in liferent, by way of locality, conform to disposition, date
" and his infeftment taken, or to be taken, there
" on: But declaring always, as it is hereby expressly provide
" and declared, that the liferent so reserved to me, the said Mr
" Lilias Montgomerie, shall be, and is hereby expressly bur
" dened with any liferent locality hereafter to be granted by th
" said Hugh Montgomerie, my eldest son, to and in favours o
" Mrs Eleonora Hamilton, his present wife, of such parts of th
" said lands and estate as he shall think proper, not exceedin
" one-third part of the free rents thereof, so far as the same i
" free and unaffected at the time, with the liferent locality
" granted by me to the said Alexander Montgomerie, my hus
" band, and after deduction of teind and superior's duties,
" ministers' stipends, schoolmasters' fees, cess, and other publi
" burdens, under which express declaration and burden th
" liferent in favour of me, the said Mrs Lilias Montgomerie, i
" hereby reserved, and no otherwise; so that in case it shal
" happen that the said Hugh Montgomerie, my son, shall di
" before me, in that event, the said Eleonora Hamilton shall
" immediately have access to her said liferent locality, in th
" same manner as if my liferent had not been hereby re-
" served."

This entail contained prohibitions, with relative, irritant, an

resolutive clauses, which were *mutatis mutandis*, the same as similar clauses in the two entails of 1728 and 1757, and were expressed in these terms, — " As also declaring, likeas it is " hereby expressly provided and declared, that the said Hugh " Montgomerie, my son, and his heirs and successors, shall " be obliged to bruik and possess the lands and estate before " disponed, and to establish the rights thereof in their persons, " by virtue of these presents, and to take the rights, and securities, " and infeftments of the same, with the burden of the reserva- " tions, and irritancies, and provisions herein contained, to and " in favour of the heirs of taillie before named, in the order " before specified: As also providing, likeas it is hereby ex- " pressly provided and declared, and appointed to be inserted in, " and provided and declared by, the instruments of resignation, " charters, infeftments, sasines, services, retours, precepts, and " others to follow hereupon, that the whole heirs of taillie before " mentioned, as well male as female, and the descendants of their " bodies, who shall succeed according to the foresaid destination, " shall be obliged to assume, use, and bear the sirname, arms, " and designation of Montgomerie of Skelmurlie, as their proper " arms, sirname, and designation in all time hereafter; and if " any of the said heirs of taillie before mentioned, or the descen- ' dants of their bodies, who shall happen at any time hereafter " to succeed to the said lands and others foresaid, shall do in the " contrary thereof, then, and in that case, the heirs of taillie before " mentioned, male or female, and the descendant of his or her " body, so contravening, shall *ipso facto* amitt, lose, and tyne their " right, title, and possession above specified, to the said lands " and others before mentioned, and the same shall in the case " foresaid, *ipso facto* fall, accresce, and pertain to the next heir " of taillie who would succeed if the contravener and the descen- " dants of his or her body were naturally dead: And it shall be " leisom to the next heir of taillie to establish the right thereof

" in his or her person, either by adjudication, delarator, o
" serving heir to the person who died last vest and seised therei
" preceding the contravener, and that without being liable t
" the said contravener, his or her debts or deeds, or by an
" other manner of way consisting with the laws of this kingdom
" and the persons so succeeding upon the contravention, an
" the decendants of their bodies, shall be obliged to assum
" bear, and wear the sirname, arms, and designation, under th
" like irritancy, to which the whole heirs of taillie before men
" tioned, and the descendants of their bodies, that shall happe
" to succeed to the said lands and others foresaid, are to b
" subject and liable through all the succession in time coming
" and also providing, likeas it is hereby specially provided an
" declared, and appointed to be contained in, and especiall
" provided and declared by, the instruments of resignation
" charters, infeftments, sasines, services, precepts, retours, an
" others to follow hereupon; that it shall not be leisom or lawfu
" to the said Hugh Montgomerie, my son, nor to th
" heirs-male of his body, nor to any others, the members o
" taillie before mentioned, to alter, innovate, or change th
" foresaid taillie and order of succession before expressed, or t
" do any other deed, directly or indirectly, in any sort, whereby
" the same may be any way altered, innovated, or changed, or t
" possess, by any other title than this present right; and als
" that it shall not be leisom or lawful for the said Hugh Mont-
" gomerie, nor to the heirs-male of his body, nor to any othe
" the members or heirs of taillie before mentioned, to sell, dis-
" pone, wadset, or impignorate the said lands and others foresaid,
" or any part or portion thereof, or to grant infeftments o
" annual-rent out of the same, or any other right or security,
" either irredeemably or under reversion, of the said lands and
" others foresaid, or any part thereof, nor to contract any debts,
" or grant bonds, nor to do any other deed of commission o

" omission, either civil or criminal, whereby the said lands and " others foresaid, or any part of the same, may be apprised, ad- " judged, evicted, or become caduciary, escheat, or confiscated; " Declaring always, that if the said Hugh Montgomerie, or the " heirs-male of his body, or any others, the members or heirs of " taillie before mentioned, shall do in the contrair hereof, then " and in that case, all and every one of such acts and deeds, " with all that shall happen to follow, or may follow thereupon, " shall be *ipso facto* void and null, and of no force, strength, or " effect, sicklike and in the same manner as if the said acts and " deeds had not been done, acted, committed, or granted; and " also declaring, that the persons so contravening, and the de- " scendants of his or her body, shall immediately, upon the said " contravention, amitt, lose, and tyne all right and title they " have, or can pretend to, in the said lands and others foresaid, " with the pertinents; and the same shall, in the case foresaid, " *ipso facto* fall, accresce, and pertain to the next heir and " member of taillie hereby appointed to succeed thereto, sick- " like and in the same manner as if the person so contravening, " and the descendants of his or her body, were naturally dead; " and it shall be leisom to the next member or heir of taillie to " establish the right of the lands and others foresaid, with the " pertinents, in his or her person, and that either by declarator, " or serving heir to the person who died last vest and seised in " the lands and others foresaid, immediately before the contra- " vener, or by adjudication, or any other manner of way con- " sisting with the laws or practice of the kingdom for the time, " without respect to the person contravening, or the descen- " dants of his or her body, and without respect to any innova- " vation, alteration, or change foresaid to be made by the person " so contravening, and without the burden of any debts con- " tracted by the said contravener, or of any acts or deeds of " commission or omission, or any other act or deed whatsoever,

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" which, according to the law, may be interpreted to import any
" contravention of the before written clause irritant; and the
" person so succeeding upon the said contravention, is to
" be subject and liable to the same irritancy to which the whole
" members and heirs of taillie before specified, and the descen-
" dants of their bodies, are to be subject and liable through the
" whole course of succession, in all time coming: Excepting
" always forth and from the said clause irritant, full power and
" liberty to the said Hugh Montgomerie, and the heirs-male of
" his body, and to the other subsequent members and heirs of
" taillie before narrated, to grant liferent infeftments to their
" ladies or husbands, in satisfaction to them of all terce and
" courtesies, (from which the ladies and husbands of the said
" heirs of taillie are hereby altogether excluded and debarred,) of
" the said lands and others foresaid, not exceeding one-third
" part thereof, so far as the samen is free unaffected for the time
" with former liferents, and after deduction of teind and supe-
" rior's duties, minister's stipends, schoolmasters' fees, cess, and
" other public burdens."

The entail of 1774 was never put upon record, but Hugh Montgomerie, afterwards Earl of Eglinton, was duly infeft under it in June, 1774, and his sasine was recorded in August following.

In 1784, Earl Hugh obtained from the superior of the lands of Coilsfield, a charter. This charter confirmed the entail of 1757, as granted with the consent of the trustees appointed by the act of Parliament, for concurring in the sale of Lochliboside and Hartfield, " notwithstanding the entail thereof executed by " the deceased Sir Hugh Montgomerie of Skelmorlie," and for applying the purchase money, in the purchase of other lands to be settled " in the same order as the said lands were secured to " them by his deed of entail, and subject to the restrictions " and limitations, clauses irritant and resolutive, therein con-

"tained;" and in reciting the restrictions which were given at length, each clause set out with these expressions, — "as it is by "the foresaid former tailzie, and by the disposition and deed of "tailzie above mentioned, granted by the said Alexander Mont-"gomerie, expressly provided and declared."

After confirming the entail of 1757, the charter also confirmed the deed of 1774, as granted under the restrictions "particu-"larly above specified allenarly, and no otherways;" and after setting forth the various parts of the deed, it wound up, "as the "said disposition of tailzie containing obligation to infeft and "seise the said Hugh Montgomerie, and the other heirs of tailzie "before mentioned, in the order before set down, in the whole "lands," &c. with and under the reservations before written, and "under the reservations," &c. "therein and herein before speci-"fied, and no otherways."

Under these titles, Earl Hugh enjoyed possession of the lands until his death, which took place in December, 1819.

Upon the death of Earl Hugh, he was succeeded in the enjoyment of the entailed lands by his grandson, Archibald, Earl of Eglinton, the respondent in the appeal, who made up his titles as nearest heir-male of the body, and of tailzie and provision, to Earl Hugh, by special service, which was expede in March, 1836, and by charter of confirmation and precept of *clare constat*, dated and recorded in August, 1836.

In 1838, the Earl of Eglinton sold the lands of Coilsfield to the appellants, Paterson's trustees, and in 1839, he likewise sold the lands of Skelmorlie to Hay. Paterson's trustees brought a suspension, as of a threatened charge, for the price of Coilsfield, upon the ground that the Earl had no power to sell.

The Earl thereupon brought an action against the substitute heirs of entail, setting forth the deed of entail of 1774, and the titles which had been made up under it by his grandfather and himself, and alleging, that that entail, as well as the two entails

of 1728 and 1757, were defective in the statutory requisition, and that the entail of 1774 had never been recorded; and concluding to have it found that he had a right " to sell, annailsie, and dis- " pone, in whole or in part, the several lands and estates espe- " cially above described, in any way he may think proper, for a " price or other onerous consideration, and to grant and execute " all dispositions, conveyances, deeds, and writings whatsoever, " which may be requisite or necessary for effectually conveying " the whole, or any part or parts of the said lands and others, " which may be sold and alienated; and that upon selling or " alienating the whole, or any part or parts of the said several " lands and others, the pursuer has the sole and exclusive right to " the price or prices, or other consideration, as his absolute " property, and that he has full power to use and dispose of the " same at pleasure, and that the pursuer does not lie under any " obligation to invest, employ, or lay out the same, or any part " thereof, in the purchase or on the security of any other land " or estate, or otherwise for the benefit of the defenders, or any " of them, and that they have no right or title to interfere with, " or control the pursuer in the use or disposal of the said price " or prices, or other consideration, in any manner of way; and " also, that the defenders, or any of them, have no claim or " demand of any description against the pursuer, or against his " heirs and representatives, in the event of his death, for or in " respect of the sales or alienations which may be made, or dis- " positions or other writings which may be granted or executed " by the pursuer, for or in respect of the pursuer using or dis- " posing at his pleasure, of the said price or prices, or other " considerations: and farther, it ought and should be found and " declared, by decree aforesaid, that the pursuer has full and " undoubted right and power gratuitously to alienate and dis- " pose of the foresaid several lands and others, contained in the " aforesaid deeds of entail, in any manner of way he may think

" proper, and to grant and execute all dispositions, convey-
" ances, deeds, and writings whatsoever, which may be requisite
" and necessary for effectually conveying the whole, or any
" part or parts of the said lands and others, to any person or
" persons whatsoever, and in any manner that he may think
" proper ; and that the defenders, or any of them, have no claim
" or demand of any description against the pursuer, or against
" his heirs and representatives in the event of his death, for or
" in respect of such alienation and disposal of the said lands and
" others, or dispositions or other writings which may be granted
" or executed by the pursuer."

The two actions of suspension and declarator were conjoined, and cases were ordered, which the Lord Ordinary reported to the Court. The Court (First Division) ordered new cases to be prepared, and laid before the whole Judges, for their opinions; and after obtaining the opinion of the Judges, fresh cases were ordered as to the right of the substitute-heirs to have a re-investment of the price, in case the lands might be sold.

Upon advising these papers, the consulted Judges returned an unanimous opinion, 1st, that there was no such change in the destination of the entail of 1774 from the destination in the entails of 1728 and 1757, as would make the former supersede the latter deeds; but that, whatever might have been the intention of the makers of the deed of 1774, the effect of what they had done was to create by it a new and independent title, and that as possession under it had been enjoyed beyond the years of prescription, it was to be considered the ruling title; and that as it had not been recorded in the register of entails, it could not be effectual against creditors or purchasers. 2d, That the irritant clause of the entail of 1774 did not profess to make any enumeration of the acts to be irritated, and was sufficiently broad in its terms to embrace acts of sale; and that, as the resolutive clause, in that part of it which resolved the right of the contra-

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vener, was sufficiently expressed to effect that purpose, it was of no importance, that, in the other part, declaring the mode in which the next heir was to make up his title, and which enumerated the cases of anticipated contravention, that of sale was omitted. 3d, That though of opinion the appellant had the *power* to sell, he was not entitled to a declaration that he had a *right* so to do. 4th, That the prohibitory clause was of itself sufficient to prevent all gratuitous alienations in questions *inter hæredes*, although the entail had not been recorded; and, 5th, That the heirs of entail had no claim upon the appellant, to compel him to invest the price of his sale to Paterson's trustees in the purchase of other lands to be entailed, or to prevent him from freely disposing of the price, the principle which must rule this being the same as was adopted in the cases of Stewart *v.* Fullerton, Bruce *v.* Bruce, and Queensberry *v.* Queensberry Executors. This opinion was delivered at such length, as not to admit of its being given here *ipsissimis verbis*, but the foregoing was the substance and effect of it.

In conformity with this opinion, the Court, on the 21st January, 1842, pronounced the following interlocutor: — "Find, that the "deed of entail of 1774 must be considered as an original sub- "stantive entail, and that not having been recorded in the regis- "ter of tailzies, it is not effectual against creditors or purchasers. "Find, that the sale concluded between the Earl of Eglinton "and the suspenders, Paterson's trustees, was valid and uncha- "lengeable: Therefore repel the reasons of suspension, and find "the letters orderly proceeded in the process of suspension at "their instance, and decern: and in the action of declarator "Find, that the pursuer, the Earl of Eglinton, has full power "sell the whole lands, in the said deed of entail, for onerous "prices or considerations, and to grant valid dispositions to the "several purchasers: and farther, find and declare, that upon "the sales taking effect, the pursuer is under no obligation

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"employ or lay out the prices or sums arising from the said sales, "or any part thereof, in the purchase of other lands, or other- "wise to invest the same for the benefit of the defenders, or the "other heirs of entail; and that the prices or considerations "which the pursuer may receive, will become his absolute and "exclusive property; and that he has full power to use and "dispose of the same at pleasure, free from all claims what- "soever, at the instance of the defenders, or the heirs of entail, "all in terms of the first declaratory conclusion of the summons "in the said action of declarator."

The appeal was against this interlocutor.

Mr Sandford and J. R. Hope, for the appellants. — I. The destinations in the deeds of 1728 and 1757 were identically the same, with this exception, that the latter deed omitted those branches which had become extinct by the supervening death of the parties. By the deed of 1728, after the heirs-male of the body of Sir Robert Montgomerie, the parties called are his "eldest heir-female," and the heirs-male of her body; and after them "the next heir-female successive" of the body of Sir Robert, and the heirs-male of the body of such next heir-female. When the entail of 1757 was made, the heirs-male of Sir Robert's body had already failed, and the succession was then vested under the deed of 1728, in Lilias Montgomerie, who was the eldest heir-female of his body. The deed of 1757, accordingly, takes up the destination of the deed of 1728, at the point at which it was capable of taking, and had already taken, effect, namely, the eldest heir-female of Sir Robert's body, and following the deed of 1728, continues the destination to the heirs-male of the body of Lilias Montgomerie, that is, of the eldest heir-female of Sir Robert's body, and immediately adopting the very

terms of the deed of 1728, whom failing, to the next heir-female of the body of the said deceased Sir Robert Montgomerie.

So the deed of 1774, adapting itself only to the changed state of circumstances, follows exactly the destination of the deed of 1728. At that time, Lilias Montgomerie had a son, that is to say, an heir-male of the body of the eldest heir-female of the body of Sir Robert having come into existence, and being desirous merely on occasion of his marriage, to propel the succession to him, she took up the destination of the deeds of 1728 and 1757 where they had already taken effect, that is, in herself, and conveyed to her eldest son, the heir-male of her body, and the heirs-male of his body, and to the other heirs-male of her body, and then resuming the very words of the deeds of 1728 and 1757, to the next heir-female successive of the body of the said deceased Sir Robert Montgomerie, and the heirs-male of the body of such heir-female.

Under the destination in the deed of 1728, no heir-female of the body of Lilias Montgomerie was called at all; the destination is not, on failure of heirs-male of the body of Sir Robert, to the *heirs-female* generally, but to the *eldest* heir-female, and the heirs-male of her body. On failure of the heirs-male of the body of the eldest heir-female, the succession goes to the next heir-female of the body of Sir Robert, and the heirs-male of her body. The heirs-female, or heirs whatsoever, then, of Lilias Montgomerie — that is, of the eldest heir-female of the body of Sir Robert — could never have had any right under this deed, before the heirs-male of the body of the next heir-female of Sir Robert. Her second son would have excluded the daughters of her eldest son, and if she had died leaving daughters, and no sons, the eldest daughter would have succeeded, not as heir-female, or heir whatsoever, but as being the next heir-female of the body of Sir Robert. The effect of the entail of 1728, then, is, that the

eldest heir-female, and the heirs-male of her body, were to take in exclusion of the next or any other heir-female of Sir Robert's body, and the entail of 1757 preserves the same course of destination.

It is no doubt true, that Alexander Clark, and his descendants, though included in the deed of 1728, are omitted in the deed of 1757; but the omission is stated, in the Act of Parliament, to have arisen from the fact of Clark having died without any descendants: if that were true, the omission cannot form any ground for drawing a distinction between the deed of 1728 and the subsequent deeds; and that it was not true, has neither been proved nor alleged.

It is farther objected, that the deed of 1757 was applicable to the lands of Coilsfield alone; that was necessarily so, because these lands came from the husband of Lilias Montgomerie, in lieu of the lands comprehended under the deed of 1728, which had been sold; and as he had no right in, or power over, the lands remaining unsold, he could not have comprehended them in the deed of 1757 along with the newly purchased lands of Coilsfield. There was nothing in the fact of the deed of 1757, then, being applicable only to the lands of Coilsfield, either in fact or intention, to shew that the deed of 1757 was any thing more than a continuance of the deed of 1728, rendered necessary by the sale of part of the lands comprehended under the latter deed, and the purchase of new ones.

The two deeds of 1728 and 1757, then, must be viewed as parts of one and the same entail, and the original lands, and those newly purchased, as one estate, held by one title. If so, it was quite competent to any heir in possession under both deeds, to incorporate the two into one.

The deed of 1774 did no more than effect this. The only object of that deed was to create such incorporation, and to propel the fee and succession to the son of the granter and heir in

possession. The destination in this deed is the same as in two deeds of 1728 and 1757, for the same reasons that destination in the deed of 1757 is the same as that in the d of 1728. The lands are the same as those contained in the earlier deeds. The prohibitions and fetters are the same.

But it is said, that it was not competent to incorporate the entails into one,—to make the fetters of the two deeds indiscr nately applicable to all the lands, and an act involving a fo ture of the lands in the deed of 1728, equally involves a forfei of those in the deed 1757, *et e converso*. But, when this is s the history of the title is overlooked. The deed of 1728 did contain the lands of Skelmorlie and Ormsheugh alone, it c tained likewise the lands of Lochliboside and Hartsfield, and fetters applied to the whole indiscriminately. The lands Coilsfield, being those contained in the deed of 1757, were p chased under the powers of the statute, which directed them be purchased in the place of Lochliboside and Hartsfield, directed that they should be settled in the same terms as t lands had been settled by the deed of 1728. Accordingly, deed of 1757 makes express reference to the deed of 1728, conveys the lands under the provisions and restrictions "wh " are contained in the aforesaid deed of entail," being the en of 1728.

When, therefore, Lilias Montgomerie executed the dee 1774, she possessed the lands of Skelmorlie, Ormsheugh, Coilsfield, though in form under two deeds, yet in substance effect under one entail, applicable in its fetters to the whole was, therefore, perfectly competent for her to bring the w lands under the fetters of one deed which should apply t indiscriminately; and in doing so, it was not necessary to re the provisions in each of the deeds applicable to the lands c taining them, because the rule *applicando singula singulis* wa apply.

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That the intention of Lilias Montgomerie was to make such incorporation, and having made it, to propel the fee to her son, and not to make a new and independent title, is shewn by the description which she gives to herself, and her son, in the deed of 1774, bearing express reference to their characters as heirs under the prior deeds, and by the express reference in the dispositive clause of Coilsfield, to the deed of 1757, by its date and registration.

II. If, then, the deed of 1774 was a mere continuance of the previously existing titles—a mere renewal of the previous investiture, and did not form the basis of a new and independent title, the possession which has followed upon it cannot have any effect upon the rights of the parties. The deed of 1774 cannot, in such case, be the basis of a prescriptive title, as it refers *in gremio*, to the deed of 1757 ; and the two deeds, so far as regards the lands of Coilsfield, are not only not inconsistent or adverse, but are identically the same.

III. Farther, even if it were not competent to Lilias Montgomerie to incorporate the two entails in that of 1774, so as to make an act of forfeiture in regard to one parcel of the lands imply a forfeiture as to the other, and the two parcels are to be regarded as estates enjoyed under separate entails, there was nothing in the deed of 1774 to destroy the deeds of 1728 and 1757, and the deed of 1774 must then be read as having reference to each of the deeds respectively, so as to make the fetters in each of the deeds apply to the lands contained in it.

IV. At all events, the entail of 1774, though unrecorded, is effectual in all questions *inter hæredes*; and even if the respondent may sell, and the purchaser be entitled to insist on implement of the sale, the respondent will be bound to reinvest the price in lands to be entailed. In Stewart *v.* Fullerton, 4 *Wil. and Sh.* 205, the

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heir was found not to be under any such obligation; but there th defect was in the entail itself, and the decision rested mainly o the inconvenience and absurdity of reinvesting under a defectiv deed, liable on the occasion of every successive investment, to b defeated by a new sale. But here the entail itself is complete the defect is only in the non-registration, and if the heir is oblige to reinvest under the fetters of the entail, any of the substitu heirs can register and prevent the possibility of another sale. I Queensberry *v.* Queensberry Executors, it was held by th Court below, that an action by an heir of entail against the exe cutor of his predecessor, for damages in respect of a lease in con travention of an entail which had not been recorded, could b maintained. That judgment was, no doubt, reversed by th House; but those members who delivered their opinions, gav them professedly in affirmance of those opinions delivered in th Court below, which, on careful examination of the whole, wer considered to be most satisfactory, without any farther opinio being given by the noble Lords; and on examination of th opinions delivered by the minority in the Court below, whic were so approved of, it will be found, that some were against th competency of the action, because the heirs should be confined t the remedies given by the entail, while others thought the actio incompetent, because it was of a highly penal nature, and no transmissible against executors.

Here the claim of the substitute heirs, that the heir sellin should reinvest, would be a remedy within the terms of th entail, not of a penal nature, and about the transmissibility o which no question could arise. There is, therefore, no authority either in the Ascog or the Queensberry case, for saying, that suc a claim is incompetent, or in other words, that an entail, whi unrecorded, imposes no obligation upon the heir in possessio and possesses no validity *inter hæredes*, in contradiction of th judgments, Wilson *v.* Callender, *Mor.* 15369, and Hall *v.* Cass *Mor.* 15373.

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Mr Pemberton Leigh, and E. S. Gordon for respondent. — I. If a disposition of lands be made by an heir of entail, differing in its terms from the entail, and be followed by charter and seisin, the disposition will form the basis of a new investiture, Broomfield *v.* Paterson, *Mor.* 15618; Paterson *v.* Cuthbert, *Hume*, 869; and if possession be had under the new investiture beyond the years of prescription, it will become the governing investiture, Vere *v.* Hope, 12th February, 1828.

The deed of 1774 was framed with the intention of incorporating under one entail the different parcels of land which the granter had hitherto possessed under the two entails of 1728 and 1747. Contravention of the fetters of the deed of 1728 would not have inferred a forfeiture of the lands in the deed of 1757, *et e converso*. To accomplish this was the object of the deed of 1774. It might have been done, perhaps, so as at the same time to keep in force the two previous deeds; but it was not so accomplished. There is no reference in the deed of 1774, which would necessarily lead even to a knowledge of the existence of the previous deeds, and still less of any intention to keep alive their provisions. Its whole structure is as if the framer was for the first time making an entail of the whole lands. All the lands are embraced by it under one set of prohibitions and fetters, without mention of any others, as having previously existed, or being intended to be continued; and an irritancy as to any single portion of the lands, is made to infer a forfeiture of the whole; and not only so, but the heirs are, by an ordinary clause, taken bound to possess "under this deed alone," and prohibited from "possessing under any other title than this present right."

That the deed of 1774 was not intended merely to propel the fee to Hugh Montgomerie, to be possessed by him under the fetters of the previous deeds, is evident from this omission of all reference to these deeds, and to any such intention; whereas the ordinary form of a deed for that purpose, contains an

anxious recital of the previous existing deeds, and a distinct enunciation of intention to keep them alive; and if there be more than one deed, a repetition of the provisions of each, applicable and confined to the land contained in it. Not only so, but the terms of the deed of 1774 are uniform and applicable alike to all the lands, while the two deeds of 1728 and 1757 were disconform to each other, and each confined to the lands contained within itself, so as each to form a separate independent entail. The effect, therefore, of the deed of 1774, was to propel the fee, no doubt, from Lilias Montgomerie to Hugh Montgomerie, but not to be held by him under the same entails under which she herself had hitherto enjoyed them, but under a new and original investiture.

The destination in the deed of 1728 was different from that which was made by the deed of 1774. Under the first of these deeds, the heirs whatsoever of Sir Robert Montgomerie would, under the destination to the eldest heir-female, have been entitled to take on failure of the heirs-male of his body, *Ersk.* III. 8, 48, notwithstanding that the destination to the eldest heir-female was followed by the words "to the heirs-male of the eldest heir female," as these words were mere surplusage to accomplish what would have taken place without them, according to the ordinary rules of the law — the succession of males before females, Carruthers *v.* Majendie, 2 *Bligh*, 692, where, under a provision to the heirs-female of a marriage, and the heirs-male of their bodies, it was found, that on failure of the only son of the only daughter of the marriage, without issue of his body, a sister of the son was entitled to sue as an heir of provision under the settlement. Applying this case to the entail of 1728, the respondent would, under that deed, be entitled to take as an heir-female. That the destination is not to heirs-female generally, but to the "eldest" heir-female, makes no difference, *Craigie* and *Stev* App. *Ca.* 238, where it was held, that a destination to the elde

heir-female of the body, and the descendants of her body, did not entitle the *daughters*, successively with the heirs of their bodies, to take in exclusion of the proper heir-female under the general meaning of that term. If, then, the respondent were to die, leaving daughters only, without any sons, the succession would, under the deed of 1728, immediately open to them; but under the deed of 1774, by the destination being, on failure of the heirs-male of Hugh Montgomerie, to the heirs-male of the body of Lilias Montgomerie, if the respondent were to die, leaving daughters only, they would be excluded by the heirs-male if any, of the bodies of Hugh and Lilias Montgomerie.

This difference in the destinations between the deeds of 1728 and 1774, did not originate with the deed of 1774, but with the deed of 1757, of which the destination in the deed of 1774 is but a repetition. If the intention, then, of the deed of 1774 was only to incorporate in one entail, having one destination, lands which had hitherto been held under two deeds, having each a different destination, and if, as is said, the deed of 1757 was an independent entail of the lands of Coilsfield, whose destination was preserved in the deed of 1774, how was that possible, by a deed which contained only one destination, and that different from the destination of one of the deeds to be incorporated? Suppose, moreover, the respondent were, by a new deed, to make a destination of the lands of Skelmorlie, in conformity with that in the deed of 1728, would this not operate a contravention of the deed of 1774, and infer a forfeiture of the lands of Coilsfield?

But above all, it is undeniable, that in the deeds of 1757 and 1774, the family of the Clarks, who had been called by the deed of 1728, were wholly omitted. It is no doubt true, that where a branch of heirs, called previous to the heir in possession, has become extinct, the heir, in framing a destination in conformity with the previously existing destination, may omit this branch,

yet the matter is very different when the branch is called subs quently to the heir. He is not entitled to act upon his ow opinion, or the surmise of others. The prohibition is not alter the order of succession. The effects and consequences contravening this prohibition must depend upon the fact contravening, not upon the extent to which either party may, b evidence or otherwise, shew that the fact is prejudicial innocent. It may, or may not, have been true, that the Clar had become extinct; but it had never been ascertained in an way upon which a Court would be entitled to act. *Non consta* but that many years hence a member of the Clark family, migh turn up; and if he did, the recital in the statute would be a obstacle to his proving his relationship.

III. In every view, then, the deed of 1774 must be regarded a an original independent title, capable of being the basis of a ne investiture, and of cutting down the previous investitures, followed by possession of sufficient duration; and as the posse sion of the lands had been held under it for a period greatl exceeding the years of prescription, the necessary result must b that the two deeds of 1728 and 1757 have become inoperativ If so, then the respondent possesses under an entail which h never been recorded, and which, therefore, cannot form any ba to his exercise of all the rights of a proprietor in fee-simple.

IV. But even if the deed of 1774 is to be regarded as merel propelling the fee, and therefore not requiring registration, and both the other deeds are ineffectual, inasmuch as the resolutiv clause in all of them, though it sets out with general terms, wind up by an enumeration of the acts to be resolved, omitting in th enumeration the acts of sale and alienation. Now, it has bee repeatedly held, as in Bruce v. Bruce, *Mor.* 15539, and Rennie v Horne, 3 *Sh.* and *M'L.* 142, that, however general the claus

may be in the outset, if, before closing, it adopt enumeration, every act prohibited must be enumerated, otherwise those that are omitted will not be affected.

V. If the respondent is not restrained by the deeds of entail from selling the lands, there is nothing in these deeds to infer any obligation upon him to reinvest the price. Though an entail with prohibitions against selling or altering the order of succession, but unfenced by proper clauses for that purpose, may entitle the heirs to set aside gratuitous deeds, and to preserve the estate as it came from the maker, there is nothing in such a deed, after the lands are conveyed to an onerous purchaser, past being brought back, which can entitle them to have the price invested in other lands never contemplated by the entailer. A simple prohibition to sell, does not impose any obligation upon the heir capable of being enforced by inhibition or otherwise, Bryson *Mor.* 15511, Ankerville, *Mor.* 7010. How then can it be considered as making an obligation, the breach of which is to entitle them to an equivalent, by new investment or damages? The rights of parties, and the measure of their relief, can be ascertained only by the entail itself. This is true, even of an entail properly fenced; for the effect of the irritant and resolutive clauses is not to entitle the heirs to any thing beyond or not within the entail, but merely to make void an act done in contravention of what is in the entail. If, then, the entail is ineffectual to prevent a sale, there is nothing in it imposing any obligation to invest the price of the sale, neither can it be said that the reepondent ought to have recorded the entail, and that he took the lands on the condition of doing so: there is no obligation or condition of the sort imposed upon him by the entail.

That the substitutes have no claim upon the heir in case of his selling, for reinvestment of the price, has been deliberately

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determined in Stewart *v.* Fullerton, 4 *W.* and *Sh.* 196; B *v.* Bruce, 4 *W.* and *Sh.* 240; Elibank, 1 *Sh.* and *M^cL* Campbell, 1 *D.* and *B.* 81; and Thomson, 1 *D.* and *B.* and that they have not either any claim for damages, has been determined in Queensberry *v.* Queensberry Executors, and *S.* 254. In the last of these cases, the entail was recorded; in the others the act complained of was susta because of defects in the entail itself, which had been recor but in all of them the principle upon which the relief aske refused was the same — that according to the strict rule of i pretation applicable to entails, the relief asked must be autho by the deed itself, otherwise it cannot be given.

LORD BROUGHAM. — This case, my Lords, consisted appeal from the judgment of the Court of Session in Scotla three several actions. The Earl of Eglinton was heir of in possession of the two valuable estates of Coilsfield and morlie, both of which he held, or was supposed to hold, unde fetters of an entail. There had been an entail executed b ancestors of those two estates in the year 1728, and a s quent entail in the year 1757, of one estate, instead of ano by virtue, and under the provisions of a private act of Parlia enabling Mrs Lillias Montgomerie, the heir then in posse so to deal with the property. There was afterwards, in 1 an entail executed by Mrs Lillias Montgomerie, at a time she and Captain Montgomerie, as the heir-apparent unde investiture, were the heirs in possession and in reversion. the question in the Court below arises chiefly on the force effect of this last entail of 1774.

The Earl being advised that he was not under the fett an entail, so as to be prohibited from selling the prop brought it to sale, and it was purchased; but there being a d on the part of the purchaser, whether he could take a suffi

title under the Earl's investiture, in respect of the fetters with which he was supposed to be bound, a suspenion of his charge to pay the purchase money was brought, and that suspension would itself have raised the question. But the Earl, according to a very convenient and most beneficial form of action known in Scotland, (the want of which we very much regret in this country, but which I am in the course of endeavouring to supply, by a bill now before your Lordships' House,) the Earl availing himself of the Scotch law in this respect, pursued two actions of declarator against the several purchasers of the estate, which raised these questions. He first desired to have it found and declared, (which was indeed the main stress of the bill of suspension, brought by the purchaser, of the Earl's charge to pay the price,) that he was free from the fetters of the entail; and secondly, to have it declared that he had power to sell the property without being called upon to reinvest the purchase money.

In these cases, which were conjoined, their Lordships in the Court below first of all took the opinion of the consulted Judges on the grave questions of law raised by the pleadings, and they came to a determination in the Earl's favour upon the first part of the declaratory action, namely, finding that he was not under the fetters of an entail, but they hesitated before they would give him a decree upon the second, and very important part — perhaps, I may say, substantially the most important part, namely, whether, if he was entitled to sell, he was not, as it were, a trustee for the future heirs of entail coming after him, and was not bound to reinvest the purchase money, so that they should not be damnified by his sale? Afterwards, their Lordships were of opinion, that they had not quite soundly dealt with the second of these questions, in refusing to take it up as they at first had done, but that they were bound to give him also the benefit of their opinion on this part of the declaratory action, namely, to declare his right to sell and appropriate the purchase money

without investing it. And accordingly they ordered additional cases, and those cases were, with the usual learning and ability, and with the great length of argument, that distinguishes Scotch professional men, discussed most fully. I have read them, as most of your Lordships have, and the Court afterwards added, what they had not done at first, their opinion, after taking the opinion of the consulted Judges. All were satisfied with that part of the summons, and gave their declaration upon that right, as well as upon the other.

Now these are the decrees of the Court below, which are brought before your Lordships by this appeal. They are very important to the Scotch law, as well as to the parties. Three questions having been raised in this case, have been brought before your Lordships by the appeal, and, having been fully argued, now await your decision.

First, was the deed of 1774 a new, and substantive, and independent entail? or was it only one related and ancillary to the former entail of 1728, varied under the powers of the estate bill in 1757, and having the mere operation of propelling the fee from the heir of entail in possession to the heir next called?

Secondly, was the entail of 1774, if substantive and independent, valid, as being fenced by the requisite clauses against sale? And one of the contentions was, that even if it were held to be a merely dependent and relative deed, and the entails of 1728 and 1757 still in force, the whole of the clauses being the same in all the three deeds of entail, still the Earl was free, because there was a defect in the resolutive clause.

Thirdly, was the heir now in possession, the respondent, authorized to make sale of the property, without reinvesting the purchase money, and settling it to the uses of the entail?

These questions exhaust the subject in every way in which it can be considered. For if the first be determined in the negative, and the deed of 1774 only propels the fee, then the old

entail subsists; but if in the affirmative, then, not being recorded, and more than forty years' possession having been had under it, the entail is gone. Next, either of these determinations lets in the *second* question: for if the fencing clauses common to both the old and new entails are insufficient, the fetters are gone in any view; and if sufficient, the old entail would be valid to prevent sale, though the new entail not being recorded, and the period of prescription having expired, the prohibition would fail. But then, under this view, the invalidity of the fencing clauses would at once dispose of the *third* question in the respondent's favour, as to the re-investing the purchase money. Again, and lastly, if that *third* question be decided against the obligation to reinvest upon other grounds than the insufficiency of the fencing clauses, the respondent prevails, though these clauses may be effectual; whereas, should they be deemed effectual, and the obligation to reinvest be held sufficient, the appellant, though defeated on the other grounds, would substantially prevail.

The Court below, after a full examination of the whole question, and considering an elaborate, most able, and most learned opinion of the consulted Judges, came to the determination, that the entail of 1774 was substantive and independent, and being unrecorded, could not affect creditors or purchasers: that the resolutive clause, to which the objection had been taken, was sufficient to fence the prohibition levelled against selling: but that still, upon the authority of the Ascog, Tillycoultrie, and Tinwald cases, there was no obligation to reinvest the price obtained for the lands entailed. This decision was unanimous; for although Lord Cunninghame at first strongly inclined in the respondent's favour upon the second point, chiefly moved by the authority of the Ballilish case, and inclined against him, though not so strongly, upon the first point, rather considering the deed of 1774 as ancillary and dependent, and as propelling the fee, he was fully satisfied on farther consideration, and yielded to the

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force of the argument so powerfully maintained by the consul Judges.

I have never had any material doubt upon the *first* po Upon the *second* I was for some time inclined to agree with Lord Ordinary; but a farther consideration has made me, w him, come to the opinion of the consulted Judges. Upon *third* point, I also, upon the whole, agree with them, and I therefore prepared to recommend, that your Lordships sho affirm the decree now under consideration.

I. In considering the *first* question, it is clearly not suffici to be satisfied of the intentions or views entertained by the pa the maker of the deed. Mrs Lilias Montgomerie might h nay, she very probably had, for the governing motive of her p ceeding, the desire to advance Captain Montgomerie, by p pelling the fee to him, retaining the liferent to herself. But did not express that this was her design, and her only design that deed which she executed in 1774; and though she l expressed it, yet if she, in point of fact, went farther, and m new, and inconsistent, and independent provisions, her expressed ject would not avail to stamp upon the deed a dependent charac It is to be observed, that she never refers once to the entail 1728, the foundation and root of the whole proceeding, prio 1774, and she only refers to the deed of 1757 for the sake description as to the land of Coilsfield. It is true, she menti herself as heiress of tailzie, but she does not state under w entail; and she might have described herself as such, in an strument which was really, and in point of fact, designed to in vate the former settlement.

Now, I am of opinion, that the deed of 1774 was a new different entail. The mere omision of all reference to the en of 1728, it is hardly possible to get over. I do not believe any entail has ever been held to be ancillary, and merely

pulsive of the fee, in which this entire silence as to the former entail was preserved.

The Lord Ordinary refers to the case of Turnbull v. Hay and Newton, in 1836, (reported in 14 Shaw,) where the Court held a deed to be propulsive merely, in which there was some variation of language in repeating the fencing clauses. But I do not well see how they could hold the second deed to be an independent, and new, and inconsistent entail, when it expressly disponed under the limitations of the first entail, referring to it by its date, and required the heir to possess by that former entail. Had the present case referred to the entail of 1728, and especially had it provided that the heir of the new entail should possess under the limitations of the old, referring to it in terms, the question now before us would have stood upon a very different footing. But independently of that consideration, the two estates are, as it were, united and comprehended within the scope of the same clauses prohibitory, irritant, and resolutive, in the entail of 1774, they never having been comprehended before under the same clauses in any one deed; so that forfeiture by contravention, under the deed of 1774, as to one, would have inferred a forfeiture of the whole — a sort of cross forfeiture. It must farther be observed, that the new deed requires the heirs and successors to possess under the limitations of the new deed, and none other. The words are, to "be obliged to brook and "possess the lands and estate before disponed, and to establish "the rights thereof, in their persons, by virtue of these presents;" and they are expressly prohibited "to possess by any other "title than this present right," which prohibition is generally fenced by a resolution and forfeiture of the contravened right.

It is to be observed, respecting such deeds as an heir of entail in possession makes merely to propel the fee, that they must very closely follow the tenor of the original and radical entail; because, unless they be so conceived as to be wholly identical

with it, there is some difficulty in understanding how a forfeiture is to be avoided, supposing the original deed to be sufficiently fenced; nay, more, there seems some anomaly even then. For example, if Mrs Lilias Montgomerie possessed under the deed of 1774, which she must have done if she propelled the fee to the next heir *alioque successurus*, and converted her own fee, under the old entail, into a mere liferent, giving her son, before his time, a power to jointure his wife, one does not very well see how she could escape a forfeiture under the careful prohibition contained in the deeds of 1728 and 1757, against brooking, that is, enjoying or possessing, under any title except that of those deeds themselves. However, this difficulty must long since have been got over in the Scotch law, because the validity of propelling deeds has long been fully recognized.

There seems, however, notwithstanding this remark, no ground for holding that any very strict construction should be applied to such conveyances, or that a leaning should be shewn towards considering them as propulsive. The presumption may no doubt be alleged as rather in favour of an heir of entail doing nothing contrary to the rights vested in him, or which would incur forfeiture. But yet the general leaning is ever against fetters and for freedom of possession, and we are quite sure, no great mischief can ever result to the entail itself, from such dealing with the property, because the new deed, if an independent and substantive one, must be perfectly ineffectual until the term of prescription has run. Nay, if it alters or innovates upon the old investiture, the risk forfeiture of is incurred, until that prescription has removed all danger.

I am, for these reasons, very clearly of opinion, that the Court below has come to the sound and correct conclusion upon the fundamental question in the case, and that the deed of 1774 constituted a new and independent entail. If so, possession was had upon it; and as it was never recorded, that possession

more than the years of prescription upon an unrecorded tailzie, worked off the fetters imposed by the recorded tailzies of 1728 and 1757, so that no fetters remained with the heir in possession.

II. I come now to the *second* question, touching the validity of the fencing clauses in the governing deed, the subsisting entail of 1774.

Now, it is not correct to say, as the respondents contend, that the resolutive part of the resolutive clause omits selling in its enumeration. The resolution is levelled generally against the "persons *so contravening*," who are "declared, upon the *said* "contravention," that is to say, of the prohibitions generally, "to lose all right and title," and the same shall go to the next heir of entail, as if the contravener and his heirs were naturally dead.

Now it is not denied, that this resolution, following a complete irritancy, and by reference, like the irritancy to a complete prohibition, would have been quite sufficient, had the clause there stopped. The defect, therefore, is not in the resolutive part of the clause, but in that unnecessary part which is added, setting forth, that the next heir not contravening may obtain the estate. This additional provision states, that such "next heir is to ob- "tain the estate without respect to any innovation, alteration, or "change foresaid, made by the contravener, and without the "burden of any debts contracted by him, or of any acts or "deeds by him done or omitted, or any acts or deeds, whatsoever, "which may by law be deemed a contravention." It is evident, that this amounts to no qualification or restriction of the preceding generality. It does not even apply to that generality necessarily, and the general resolution is sufficient without it.

But it is said, that the irritant clause is qualified by the enumeration, and that in the case of Ballilish, Horne *v.* Rennie,

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decided below in 1837, and reversed here in 1838, (3 Shaw a M'Lean,) a general irritancy was held by your Lordships to insufficient, by reason of a subsequent special enumeration, which sale was left out, although "failure in any part of t "premises" was added. I at first was much influenced by t reference; but I find, upon a nearer examination, that the ca are altogether different. In the Ballilish case, as in the fi Tillycoultrie Case, there was a particular enumeration of t acts which should defeat the contravener's right, and sale v omitted. We held, differing from the Court below, that t entailer had not relied upon, or confined himself to, the gene words, but had undertaken to designate by particulars wl should constitute an irritancy and a resolution.

In the case now at the bar, he confines himself, in the irrita clause, to generals. "If the heirs shall do in the *contrair* here "then, and in that case, all and every one of such acts a "deeds shall be *ipso facto* void and null, and sicklike as if t "said acts and deeds had not been *done*, acted, committed, "*granted*." No one can say that a sale is not an *act done*, o deed of sale a *deed granted*. But after following this, which the whole of the irritant clause, with a similar general resolut clause, the entailer adds a provision respecting the next h holding the estate on the forfeiture free from all acts and de of the contravener. This part of the clause, or rather this mat adjected to it, has never yet in any case been held to form integral part, either of the irritant clause, or of the resolut clause, so as to limit the construction of those clauses, and to def them by reason of the omission. I therefore think, that t entail would have been effectual, and the prohibitions well fenc had the deed of 1774 only been recorded; but not having b recorded, the heir in possession is not bound by it, whatever n have been the cause of the omission, whether neglect or desi It was an omission, which might at any time before the period

prescription had run, have been supplied at the instance of any substitute, near or remote.

III. We have now only to consider the *third* question, respecting the appellants' claim to have the purchase money invested, and the estate settled to the uses of the entail.

I consider that this point is authoritatively determined by the former cases. The Court of Session, in the Ascog and second Tillycoultrie cases, held, that the heir of entail in possession, being entitled to sell from a defect in the fencing clauses, could nevertheless be compelled to invest the price for the behoof of the succeeding heirs in the settlement. I well remember the difficulty which we, who were of counsel with the respondent, had in our attempts to support that judgment, and the numberless questions with which we were met, and all but overpowered from your Lordships, especially Lord Eldon's usual subtlety and astuteness, as to the manner in which this remedy was to be applied in favour of the succeeding heirs of tailzie. To these difficulties I need not now refer. The case was alleged by our adversaries to be of the first impression, and feeling that we could hardly hope to prevail without some authority, we produced a case drawn from the shades of manuscript repository, Young *v.* Young, which, however, weighed not at all with your Lordships, first, because it had never been published, and was little if at all known to the profession, next, because there was no distinct account before the House, or which could be obtained of the pleadings, or even of the particular facts in the cause; and finally, and very materially, because there was considerable doubt cast upon the authenticity of the note itself of the case, said to be by Lord Monboddo, but not clearly shewn to be so. The faculty repositories were searched. We delayed the argument for the purpose. The greatest pains were taken. Almost all the sessional papers relating to other cases were found there, forming

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a very valuable record, but none whatever relating to this; so t it was truly a very sleeveless errand on which we sent searchers. It was, I must say, a very blind sort of ca altogether it obtained no great attention; it was allowed no k of weight or authority by the House; and, I must fairly add deserved none.

The decree below was reversed in both the Ascog and Tillycoultrie cases, and the heir of entail who had sold, was h not bound to invest the purchase-money. The plain br ground of this decision, beside the numberless difficulties working out the remedy, there sought for the respondent, h claimed by the appellant, was, that the entailer's very purp being to effect an entail under the act of 1685, when he found to have failed in accomplishing this, his sole object, Court could not interpose to give a remedy not provided by deed, and could not constitute in favour of the heirs a tailzie lands not affected by the deed.

Now, it is certainly true, that we have, in England, been u to consider, when any breach of trust has been committed, b sale contrary to the rights of a cestuique trust, that the pe making such a sale shall be held as much a trustee, in respec the price he gets, as he was of the land before the sale. T rule is, that money is land in this case, just as where a per improperly invests money in land, the land is held to be mor — it is considered to follow the same uses, and to be under same fetters, and that the same equities are reserved to the pe over the money in the one case, where the land has been c verted into money, and over the land in the other, where money has been converted into land, or where one estate exchanged for another, in which case, the second estate stand the same position as the first. But that all goes upon the sup sition of there being a trust.

But I have to remark, in favour of the decision which y

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Lordships came to in the Ascog and Tillycoultrie cases, in defence of the principle on which they were decided, that there is the greatest possible difference between the position of an heir of entail, in Scotland, and a person who stands here in the position of a trustee for others. An heir of entail, in Scotland, is never considered a trustee for the subsequent heirs of entail. He is considered as a fiar in all respects whatever, except in so far as he is tied up, bound down, and fettered; and I have often had occasion, both at the bar in your Lordships' presence, and since I have come upon the bench, to explain the great difference, I may rather say the contrast, between the Scotch law and the English law in that respect. If I here make a tenant for life, by a settlement, he is tied up, *eo ipso*, and he can do nothing that shall endure beyond his own life estate, unless in so far as I add powers to his estate. But in Scotland it is the very reverse. The heir of entail is the fiar — he is free. Here the tenant for life is fettered, except so far as he is freed by powers. In Scotland, the heir of entail is free, except so far as he is fettered by the provisions of the entail — he is the fiar — he is in possession of the fee-simple of the estate in every particular, except in so far as he is tied up by the entail. This is the governing principle, and it is upon this governing principle that all the decisions have gone. Sometimes, perhaps, I may rather say once, they have a little deviated from the principle. I believe that Lord Redesdale prevailed upon Lord Eldon, in the Roxburgh case, to decide rather according to the views of the English law of entail than according to the principles of the Scotch law of entail. Yet the broad principle continues the same, and that is the governing rule which distinguishes the two laws.

Now, those principles upon which the Court proceeded in the Ascog and Tillycoultrie cases, clearly apply also to the present case, although the defect of the entail here is not, as in the Ascog and Tillycoultrie cases, the inept fencing clauses, but only the

omission to record the entail. I am unable to perceive ar reason arising out of this diversity, for negativing the applicatic to the case at the bar, on the doctrine in which your Lordshi proceeded in reversing the decrees of the Court below in tho former instances. You must admit, that you have no right interfere for the protection of the heirs of an entail left unr corded, and so ineffectual against purchasers and creditors, ar more than you can interfere where the entailer has made t ineffectual deed, and recorded it. Still more must you admi that you have no right to constitute an entail of lands not con prized in the entailer's deed, where the deed validly entail other lands, but became inoperative for want of registration. S far upon the principle.

But we are not left without the light to be derived fro express and direct authority. On the same day on which tl Ascog and Tillycoultrie cases were decided here, there was al decided the Tinwald or Queensberry case, and upon the ve same grounds. That was not a claim to have the price investe but it was an action of damages by the heirs of entail against t personal representatives of the Duke of Queensberry, the la heir of entail, who, while in possession, had granted leases co trary to the prohibitions. There was, as here, no defect in t fencing clauses, but the entail had, as here, not been record Consequently the Duke was held to be left free, as here t Earl is held to be left free, because the deed of 1774 has n been recorded. The entail was effectual and good there, a the entail is effectual and good here; the fencing clauses w sufficient there, and the fencing clauses are sufficient here; t entail was unrecorded there, the entail is unrecorded her that was the only defect there, that is the only defect here; th the entailers in possession were held at liberty to lease, here t entailers in possession are held at liberty to sell; so far the ca are the same. But as there was no question of sale in tl

case, there was no question of investing the price, as there is here; and because the entail had been violated, though unrecorded, the heir in succession claimed to have the right to damages, just as the heir in succession here, if he is defeated of his right by sale, claims an investment of the price; so that there is not the slightest difference between the two cases except this, that there, damages were sued for, and here, a specific performance is sued for. Here they are required to reinvest the price, so that you do not want the damages, there they could not do that, — they had done remediless damage, which they were called upon to make good. The Duke, therefore, was held entitled to grant the leases; but it was contended that he was bound, and that his representatives were bound, to indemnify the heirs succeeding, for having taken advantage of the omission to record a valid entail prohibiting the leases.

The reversal followed in that as in the two former cases, and on the very same grounds on which those had been decided. If any doubt could remain as to this being the reason of the judgment, it would be removed by the clear and full note of Mr Chalmers, the highly respectable and very accurate solicitor for the appellant, in whose favour the decision of your Lordships was given. It is to be found in the appendix, page 32, of 4th *Wilson* and *Shaw*. I must add, having argued this case for the appellant, that we put severally the contention on the same grounds as in the Ascog and Tillycoultrie cases, and that no reliance was placed by the Court, nor even by the respondent at the bar, on the diversity of the action being for damages, or on the defect being in the recording of the entail instead of the fencing clauses.

I therefore have no doubt whatever, that the present case has, on this point, as well as the two former, been well decided by the Court below.

In moving your Lordships to affirm in both the declarator

and the suspension, I also consider that the costs of the appeal should fall on the appellant. It must be considered, that the Court below were unanimous; for even while Lord Cunninghame inclined to think the deed of 1774 merely propulsive, he considered it wholly defective in the fencing clauses, and therefore was against the appellant *in toto*. If he considered the fencing clauses deficient, there was an end of the case, because they were common to the deeds of 1728 and 1757; and that disposed of the substantial part of the case, namely, the right to have the money reinvested.

I have no hesitation at all, therefore, in moving your Lordships to affirm this judgment with costs, and I have only to apologize to your Lordships for having gone so fully into the law; but the case was very elaborately argued. There seemed to prevail an opinion that there had been a miscarriage below, and therefore I felt it my bounden duty to enter fully into the argument which has left upon my mind no doubt whatever that the case has been rightly decided.

Lord Cottenham. — My Lords, I concur in the view taken by my noble and learned friend of the several points raised in this case. Upon the two first, indeed, I think the authorities are so clear, that it is not necessary to add any thing to what has been observed by my noble and learned friend. And with respect to the third, I think, after the course which was adopted by this House in the Queensberry case, it is now too late to raise the question, whether the heir in succession has any right to call for reinvestment. At the same time, I cannot but observe, that it appears to me that there is a very material distinction between the cases where the entail fails for want of proper fencing clauses, and where it fails merely for want of being recorded. Because, where there is a defect in the fencing clauses, there is a defect in the entail — there is a defect of that which is necessary to fetter the party: But where there is a defect in the recording, and the

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r therefore has a right to make a good title to a purchaser, s not follow that there should not be a right in the heir to the property produced by the sale considered as affected by ntail. An obvious distinction might arise between those ases, which, however, does not seem to have operated on ninds of the noble and learned Lords who decided the nsberry case. They considered the principle which had e obtained to be conclusive of the right of the heir to take rchase money; and that having been so decided in that I think it is much too late to ask this House to recon- the grounds upon which they decided; that point was ed in the Queensberry case.

ne language attributed to Lord Eldon, not in the Queens- ' case, but in the cases which were decided on the same day, not appear to me at all satisfactory. If that noble and ed lord ever used those expressions, he seems to have pro- d upon the ground of the supposed inutility of affixing a upon the purchase money, which may be immediately ted. You order a reinvestment of the purchase money in which is immediately to be defeated by the simple power of g that land. That is neither more nor less than what ently occurs in settlements of English property, where there power of sale attaching upon the settled estate, which power le also may be made to extend to the estate purchased in of the settled estate. No difficulty whatever occurs in carry- this trust into effect; there is the power from time to time ll. But where the property exists in the character of money, affected by a liability to the rights of those who are intended, he author of the settlement to enjoy the property. When pears in the character of land, it stands in the position pro- d by the settlement; and when it is in money, it is affected imilar trusts operating upon the property in that shape. t is a consideration, however, which, if it occurred to the

minds of those who decided that case, was not considered sufficient weight to distinguish that case from those which h preceded it. I quite concur in the opinion of my noble a learned friend, that it is now too late to consider that any disti tion can effectually be taken on that ground, and I concur in motion which my noble and learned friend has made.

Lord Campbell. — My Lords, I will trouble your Lordsh with a very few observations, as this case has been already fully discussed. I think it right to say, that I entirely concur the view taken of this case by my two noble and learned frie who have preceded me.

Two great questions arise, first, whether the Earl of Eglint the respondent, had a right to sell this estate, which he did se and, secondly, if he had a right to sell the estate, whether he bound to reinvest the purchase money?

Now I am of opinion, that he had a right to sell the est because it had been held, ever since the year 1774, under unrecorded entail. I am of opinion, that that entail of 17 must be considered as a separate, independent, and substant entail, and not a mere propelling of the fee. I certainly wo not go so far as to say, that that deed, merely because it does refer to the prior entail, for that reason cannot be considered a propelling of the fee. If it does not change the destinati and if it does not change the conditions upon which this est is held, I think it might well be a propelling of the fee, altho there be no reference to the prior entail; but if the destinat is altered, or if the conditions upon which the estate is to held under the original entail are varied, then it is a new ent

It was contended here very strenuously, that the destinat was altered. But I think, when that was fully investigated appeared quite clear, that in the event which had happened, the slightest alteration took place in the destination of the est But when you come to consider the conditions upon which

estate was held, I think a most material alteration takes place. It is only necessary to observe, that this estate, along with another estate, was made what the Scotch lawyers call *unum quid*, and that all the conditions were made to apply to both.

Lord Brougham. — Cross forfeitures.

Lord Campbell. — Cross forfeitures. The case of Graham *v.* Bontine was referred to the Gartmore case; but there, *reddendo singula singulis*, it was quite clear, that the two entails, although they were contained on the same piece of parchment, were kept entirely separate and distinct, and for that reason it was there held, that the deeds were to be considered separate and distinct entails. But here they are made one for all purposes, and the conditions upon which the land was held are materially varied.

Now, there has been possession under this deed of 1774 for more than forty years, there has been an investituture under it; and, therefore, under these circumstances, I am of opinion, that the deed of entail which was registered in 1728, is to be considered as suspended, and that the rights of the parties now are in the same situation as if that deed had never existed.

Then this deed of 1774 not having been recorded, there can be no doubt, that the heir of entail holding under it had a good right to sell. It is unnecessary to repeat what has been said as to the sufficiency of the fetters of the deed of 1728. I confess that I have not strictly attended to these points, because, although those fetters had been ever so well framed, that deed is now superseded, and the power of sale arose after there had been possession for a sufficient length of time under the deed of 1774.

My Lords, I have no doubt upon the second point, and that renders it wholly unnecessary for me for my own satisfaction to examine strictly into the sufficiency of the deed of 1728; for I have no doubt whatever, that the Earl of Eglinton, being entitled to sell the estate, was not bound to reinvest the money. As far as the sale of an estate where the entail is defective is

concerned, it is allowed, that the Ascog case and the Tilly coultrie case are entirely conclusive, and have settled the law upo the subject. But a distinction was made at the bar betwee those two cases and the present, because, in these two cases, ther being defects in the fetters, if the price of the land had been lai out in the purchase of another estate, it might have been sol and resold *toties quoties*. Now, there is no doubt, that Lor Eldon pointed out that inconvenience, as one reason for his deci sion in the Ascog and Tillycoultrie cases, but I apprehend tha in this case, there are other reasons which apply just as strongl to a case where the entail is not registered, as where the fetter of the entail are defective.

Your Lordships will observe, that this is an attempt to mak a perpetuity, because the land may be sold, and the purchase money be reinvested. If the estate is to be sold, and the pur chase money is to be reinvested, that would be a perpetuity But I apprehend, my Lords, that, by the law of Scotland, yo cannot have a perpetuity, unless you comply with the requisite of the statute of 1685, which requires that there shall be prope irritant and resolutive clauses, and that the entail shall be re corded. Then, I think, that that would have beeen a sufficien reason for the principle laid down in the Ascog and Tillycoultri cases, that the requisites of the statute of 1685 had not been com plied with, and that therefore, in the absence of that compliance with that statute, a perpetuity shall not be permitted. You Lordships will likewise consider, that the object of the entailer according to the Scotch law, when he makes a strict entail, is witl a view to a particular estate, from the love of that estate, to pre serve it in the family as long as grass grows and water runs, anc he probably would be indifferent to any estate which might b substituted for it.

My Lords, all these arguments apply with equal strengtl where the defect is in the entail not being registered; becaus

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the Act of 1685 requires the entail to be registered, and until it is registered, the heir of entail is the absolute fiar of the estate. I entirely concur in the distinction which my noble and learned friend, who moved the judgment in this case, so forcibly pointed out between the English and the Scotch law, with regard to this subject of entails. By the English law, the tenant for life has no power except what is expressly conferred upon him, beyond his own life; whereas the heir of entail in Scotland is armed with every power except that which is expressly taken from him.

It was urged at the bar, that the money here was impressed with a trust, and that therefore, on that ground, it should be reinvested. But, my Lords, I think that the analogy between the Scotch and the English law upon that subject, does not in the slightest degree hold, and that, whether the defect arises from the non-registration of the entail, or from any defect in the fetters, the heir of entail is the absolute proprietor, and he having disposed of it, the money is absolutely his own.

With regard to the defect of the entail, for want of resolutive clauses, I have no doubtthat, *inter se*, it is good, and operates as a destination, and it is only against singular successors that the entail is bad for want of fetters. Therefore, the heir-substitute might just as well come and require that the produce of the sale of the estate that has been sold, where the fetters are defective, should be reinvested for him, as he may come and require that that should be done, where there is a good entail, but that entail has not been duly registered.

However, my Lords, it seems unnecessary to discuss this upon principle any farther, because it has been expressly decided by your Lordships' House in the Queensberry case. In that case, there was a valid entail, the fetters were perfect, there were leases granted which were in contravention of the entail, and which would have been invalid if the entail had been registered. Now what were the proceedings there? There was an action

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This disposition reserved the granter's liferent in the lar with power to revoke and to sell the lands, or burden th with debt, and contained an obligation to infeft, procuratory resignation, and precept of sasine in common form, and a decla tion in these terms: — "In case these presents shall not "revoked or altered by a writ under my own hand, or the s "lands and estate otherwise disponed of, and settled by a d "contrary hereto, granted by me, then, albeit these presents "found lying by me, or in the custody of another person at "death, yet the same shall be as sufficient and valid to "intents and purposes, as if a delivered evident at the d "hereof, notwithstanding of any law or practice to "contrary."

Elizabeth Fogo, the granter of this disposition, died in 17 without having ever revoked or altered it, or having e delivered it to any of the parties in whose favour it was made

James and Agnes Russell, the two parties first disponed both died in the lifetime of Elizabeth Fogo, without leaving heirs of their bodies, and on the death of Elizabeth Fo Isobel Russell, the next party conveyed to, entered into pos sion of the lands, but without making up any title in her until the year 1805.

In that year, Isobel Russell expede a service as heires provision to James Russell, and then expede a charter of resig tion upon the procuratory in Elizabeth Fogo's disposition, u which she was infeft in September, 1805, and she continued possess the lands upon this title until her death, which took pl in 1825.

Isobel left at her death a disposition and deed of entail, wh had been executed by her in the year 1811, whereby she c veyed the lands to herself in liferent, and her sister Cathe Russell in fee; whom failing, the heirs of her body; whom faili to George Craig, and the heirs of his body; whom failing,

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David Mathie, (who afterwards assumed the name of Fogo, and was the respondent in the appeal,) and the heirs of his body, and a series of substitutes.

Upon the death of Isobel Russell, her sister Catherine took infeftment upon Isobel's deed of 1811, and entered into possession of the lands. Catherine died without heirs of her body, and George Craig thereupon expede a service as heir of tailzie and provision to Catherine Russell in January, 1827, and procured a crown charter of resignation, on which he was infeft, and he otherwise granted several deeds in his own favour for completing his title.

George Craig also died without heirs of his body, and then the respondent, David Fogo, expede a service as next substitute under the entail of 1811, and obtained a precept from chancery, on which he was infeft in June, 1830.

In 1838, James Fogo, as eldest surviving son of James Fogo, called to the succession by the deed of 1769, after failure of Catherine Russell and the heirs of her body, and heir served and retoured to his father, brought an action against David Fogo, and the other substitutes called by the entail of 1811, in which he sought to have that entail, and all the titles made up under it, reduced and set aside, upon the ground that the service expede by Isobel Russell, as heiress of provision to her brother, James Russell, was inept, inasmuch as no right had ever vested in James Russell, so as to be transmissible, and therefore the entail was *ultra vires* of Isobel; and also to have it declared, that upon the death of Catherine Russell and of the pursuer's father, the right of succession opened to the pursuer, and that he was entitled to make up titles to the lands, with consequential conclusions for delivery of possession to him by the defender, David Fogo.

The respondent alone appeared to this action as defender, and pleaded in defence, that the immediate predecessor of Elizabeth

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Fogo had died, either leaving, or as supposed to have left, con— siderable debts, and in particular, a debt of L.400 heritably secured over the lands of Row. That James Russell had under— taken to relieve Elizabeth Fogo of all these debts, and of the expense of certain inclosures, and that in consequence, she had agreed to discharge the power of revocation reserved in her deed of 1769, so as to vest the lands in James Russell absolutely.

This arrangement, the defender pleaded, had been carried into effect by a deed executed by Elizabeth Fogo in 1771 whereby she disponed the lands of Row "heritably and irre- "deemably" to James Russell, and the same series of heirs in the deed of 1769, and bound herself to execute "all dee- "necessary," in favour of James Russell, "for divesting her "and infefting him" in, the lands, and whereby Russell, on t other part, bound himself to relieve her of the debts and expe above mentioned.

Upon these facts, the pursuer (appellant) pleaded,

"I. The disposition of September 1769, being an undelive "and *mortis causa* deed, and James Russell, the appare "institute, having predeceased the granter, without issue, it w "incompetent and inept for his sister, Isobel Russell, after t "death of Elizabeth or Betty Fogo in 1777, to expede a servi "as heir of provision to the said James Russell.

"II. The whole subsequent title depends on the validity a "efficiency of this service to transfer the right to the lan "under the said disposition, to Isobel Russell; and the title "which Isobel Russell attempted to connect herself with t "lands, and with the disposition of 1769, being inept, the wh "of the writings sought to be reduced in the summons must be "set aside, as flowing *a non habente potestatem.*

"III. No other original title to the lands than the disposi- "of 1769 being at present in question, any plea founded by the "defender on the pretended contract of 1771, or on any d

"Or right which might have been completed under it, must be "disregarded; and besides, the said pretended contract is cut "off by the negative prescription.

"IV. Isobel Russell never having completed any feudal title "to the lands of Row, the deed of entail executed by her, "and all that has followed under it, must be reduced and set "aside."

The defender, (respondent,) on the other hand, pleaded.

"I. The general service, as heir of line to his father, libelled "by the pursuer, affords no title to pursue the present action, "and no other sufficient title is either libelled or shewn by him. "The only title under which the pursuer could insist in an "action for enforcing the deed of 1769, as a deed operating in "his own favour, would be a service as heir of provision under "that deed.

"II. The challenge now brought of the feudal title which "was made up by Isobel Russell is entirely groundless, inas- "much as the deed of 1769 must be held to have been a "*delivered* deed in James Russell's favour, and a proper personal "right to have been vested thereby in James Russell, which was "rightly taken up by service as heir of provision to James "Russell, and the title following on that service is a valid title.

"III. At any rate, on the assumption that no right was "vested in James Russell, Isobel Russell was in that case con- "ditional institute in the deed, and was entitled, as such, to "execute the procuratory of resignation in the deed, on evidence "of the persons previously called having failed. This fact she "duly and competently instructed by her service as heir of pro- "vision to James Russell, and the charter of resignation granted "in her favour on this evidence, and the feudal investigation "followed on it, are valid and unchallengeable.

"IV. In any event, the pursuer could not take up the lands, "except by service to Isobel Russell; who, on the principles on

" which his own case proceeds, was conditional institute und
" the deed of 1769, and he could not so serve without becomi
" bound to fulfil to the defender the very deed of entail of Isol
" Russell which he now brings under challenge. This of its
" forms a sufficient plea to exclude the present action.

" V. The feudal title in Isobel Russell's person being t
" challengeable at the pursuer's instance, the deed of ent
" executed by her, and the titles following on that entail, a
" incapable of being impeached by the pursuer; and the wh
" of the present reduction falls to the ground."

The Lord Ordinary ordered cases, and upon advising th pleadings, pronounced the following interlocutor upon the November, 1839, adding a note of great length, which will found 2 *D. B.* and *M.* 651.

" Finds, that Mrs Elizabeth Fogo, the common predeces
" of the parties, executed the deed of settlement libelled on
" 1769, whereby she disponed and conveyed the lands of R
" and others, to and in favour of James Russell, and the he
" whatsoever of his body; whom failing, to Agnes Russell, a
" the heirs of her body; whom failing, to Isobel Russell, (t
" maker of the tailzie under reduction,) and the heirs of h
" body; whom failing, to the other heirs and substitutes s
" forth in the said deed: Finds, that by this deed, the grant
" not only reserved her own liferent, but ample powers
" burden, contract debt, and alienate the estate, as well as
" alter and innovate the premises in whole or in part: Finds
" proof adduced or offered in this process to shew, either th
" the said deed was *delivered* prior to the granter's death,
" that any of the parties called to the succession acquired a
" onerous and irrevocable right in the lands under the sa
" settlement, during Mrs Elizabeth Fogo's life: Finds
" admitted on record, that on Elizabeth Fogo's death in 177
" the said Isobel Russell entered into actual possession of t

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"said lands, which she retained for thirty-eight years or thereby; "while it is farther established, by express findings in the retour "of her general service in 1805, the extract of which is pro- "duced, that both the said James Russell and Agnes Russell, "the two persons instituted by the said Elizabeth Fogo in the "said destination, died without heirs of their body: Finds it "thus legitimately proved, that the said Isobel Russell was "entitled to claim and possess the lands conveyed by the said "Elizabeth Fogo under the said disposition, as conditional "institute therein; and that although the said service was "unnecessary, and insufficient to carry any right to Isobel, yet "that it affords collateral evidence, sustained in sundry cases of "high authority in the law and practice of Scotland, as compe- "tent to shew the failure of the disponees first instituted, and of "Isobel's right to the character of conditional institute under "Elizabeth Fogo's settlement: Finds, that the destination in the "said settlement of Elizabeth Fogo, not being fenced with any "prohibitory, irritant, and resolutive clauses, against alienations, "or altering the order of succession, the said Isobel Russell was "entitled, after entering into possession, to dispone the lands, "or assign her right thereto, under such conditions as she "thought proper: Finds, that as the defender is in possession "under a tailzie executed by the said Isobel Russell, long after "she had been in possession as aforesaid, in favour of the defen- "der and other substitutes, neither his personal right nor "his feudal title to the said lands can now be impugned by "any postponed substitute-heir under Elizabeth Fogo's "settlement; therefore sustains the third, fourth, and fifth "pleas urged for the defender: Finds, that the pursuer has no "title to disturb the titles made up by the said Isobel Russell, "and on that ground, assoilzies the defender from the whole "conclusions of this action, and decerns: Finds the defender

" entitled to expenses, and remits the account thereof, whe
" lodged, to the auditor to tax and report."

The pursuer (appellant) reclaimed against this interlocuto
and the Court, (First Division,) on the 25th February, 184
pronounced the following interlocutor: — " The Lords, havin
" advised the reclaiming notes, and heard counsel for th
" parties, recall the several findings of the Lord Ordinary
" interlocutor reclaimed against, and find, that the person
" right under the deed of settlement, executed by Mrs Elizabet
" Fogo in 1769, vested in Isobel Russel, the entailer, as di
" ponee and institute under that deed, in consequence of Jam
" Russell and Agnes Russell having predeceased the sai
" Elizabeth Fogo: Farther, Find, that in virtue of the person
" right so vested in her, the said Isobel Russell had full pow
" and capacity to execute the deed of entail now under redu
" tion: Therefore adhere to the interlocutor reclaimed agains
" in so far as it assoilzies the defender, and finds expenses d
" to him; assoilzie the defender accordingly from the whc
" conclusions of the action, and decern: of new, find t
" defender entitled to the expense incurred previous to the da
" of the Lord Ordinary's interlocutor; but find no farth
" expenses due, and remit the account of the said expenses
" the auditor to tax the same and report."

An appeal was taken against these interlocutors, which w
heard at great length in June, 1841, when the cause w
remitted to the Court of Session, in the terms which will
found in 2 *Rob.* 445.

In consequence of this remit, very elaborate opinions we
delivered by the Court below, which are of too great length
be repeated here, but will be found in 4 *B. M.* and *D.* 1063.

In these opinions, the Judges *unanimously* held, that no rig
remained in Elizabeth Fogo; but great difference of opinion w

shewn in regard to the particular character in which Isobel Russell took under the deed of 1769. *Six* of the Judges were of opinion that she took as conditional institute, and that as such, the personal right passed from Elizabeth Fogo to her. *Four*, that she took as a substitute, the personal right having passed to James Russell. *One*, that she might, at her option, take either as institute or substitute; and the remaining Judge, (*Lord Jeffrey*, being absent from indisposition,) that she might take either as substitute or as conditional institute, to be determined, *ex eventu*, by James Russell's (the institute's) survivance or predecease of Elizabeth Fogo. But all the Judges concurred in holding, that in whatever character Isobel Russell took, she had a good completed feudal title; those of them who held she was a conditional institute, considering that she was entitled, *de plano*, to use the procuratory and precept, and to take infeftment under the deed of 1769; or that, if she were to be viewed as a substitute, (in which all the other Judges concurred,) then the service expede to James carried the personal right which was in him; and they all likewise concurred in holding, that in no view could declarator have been necessary, as it could neither give nor carry any right, and was useful only as an authoritative means of evidence of the failure of prior parties.

Mr Solicitor-General and Mr Kindersley, for appellant. — The remit by this House has not produced the result that was desired; but, on the contrary, has brought out greater difference of opinion; and being upon a question involving the ordinary principles of conveyancing, it is impossible that the judgment can stand without causing the greatest doubt and uncertainty in the profession; for, though the Judges all concur in holding that the action is not maintainable, there is no one principle upon which they arrive at the conclusion in which they are all agreed. We maintain two points, — 1st, That the service by Isobel

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Russell to James Russell was altogether inept; and 2d, Th Isobel, under her personal right, had no power to execute t deed of entail of 1811.

By the terms of the destination in the deed 1769, Jam Russell was institute, and had he survived Elizabeth Fogo, t granter, he would have taken in that character; and in such ca service to him by Isobel would have been a *habile* mode making up her title; but, inasmuch as James Russell predeceas Elizabeth Fogo, and the deed of 1769 was a *mortis causa* dee which had never been delivered, and, for aught that appea may never have been even known to James Russell, the right the land remained in Elizabeth Fogo until her death, and up that event, became part of her *hæreditas jacens*; for if no rig vested in James Russell in her lifetime, still less could it do upon her death, at which time he had long predeceased. T feudal fee was in Elizabeth Fogo, by virtue of her infeftmen and the personal right was also in her, as it had never be parted with. Elizabeth Fogo, then, being the person last ves in the right, Isobel Russell's service should have been to h and not to James Russel; and having been to James, carried right. That was found in Gordon *v.* Gordon, *Mor.* 14368.

[*Lord Brougham.* — In that case there was no institute ev *in esse*; no heirs of the body ever came into existence.]

That case went upon this, that the title remained in t granter, as we maintain it did in this; there is no differen between the two cases.

In Peacock *v.* Glen, 4 *S.* and *D.* 742, Beattie, no doubt, h a good personal title; but the question was, whether he h power to grant an heritable bond, not having served heir to h uncle, who had reserved the fee to himself? That case is distinct authority that a party having a mere personal right h no authority to affect the land.

[*Lord Cottenham.* — As I understand, the Judges say, if

party be institute, his personal right may do; but none of them say that such a right in a substitute would do. James Beattie was treated as a substitute.]

No doubt; and it is difficult to find any distinction between the destination in that case and in this. To be sure, no children of the body ever were in existence, while here the first disponee was once in existence, though he died before the granter; but this is a difference without a distinction, if what Lord Moncrieff says be attended to. See 9 *S.* and *D.* 916.

In Colquhoun *v.* Colquhoun, 8 *F. C.* 599, Robert Colquhoun was the heir of the second *nominatim* disponee; and, whatever authority that case may afford in other respects, the opinion of the majority of the consulted Judges is distinct, that as James, the first disponee, died in the life of the disponer, and no delivery of the deed had occurred in the life of James, service to him carried nothing.

In Colquhoun *v.* Colquhoun, the grounds of the decision in Gordon *v.* Gordon were misapprehended; but that misapprehension was removed in Anderson *v.* Anderson, 10 *S.* 701, where it was shewn that the decision went upon the assumption that the fee remained in the granter of the deed; and Peacock *v.* Glen was decided upon this understanding of the case.

In Denniston *v.* Crichton, 5th February, 1824, the authority of Gordon's case was disregarded; but there the granter of the deed had not reserved any powers as a proprietor in fee-simple, so that he plainly was denuded.

Though in Gordon's case the conveyance was to the heirs-male of the body of the granter; and in Peacock's, to the heirs of the body of the granter, that cannot make any substantial difference between these cases and the present; for the heir in either of these cases would not the less be an institute, that he was not expressly named; and yet, inasmuch as they failed, as James Russell did in this case, it was held, that the first taker under the

deed should have made up his title by service to the granter. If the heirs, then, in these cases would have been institutes had they ever come into existence, though not called *nominatim*, and those called after them were obliged to pass them by, because they never came into existence; the case must be the same where the party first called, though he once existed, has ceased to do so when the destination opens to him. In either case there was no one to take as first disponee, and the opinion of the majority of the judges is distinct, that the parties thus failing take nothing under the deed which can be, or requires to be, taken out of them by service.

If Isobel Russell is to be viewed as institute, because the party named institute by the deed had ceased to exist, would she have been bound by fetters of entail directed against substitutes, but not against the party institute, *ex facie* of the deed?

[*Lord Campbell.* — Who is to be bound by the fetters, must arise, *ex facie* of the deed, not *ex eventu.*

Lord Cottenham. — If James had survived the granter, Isobel would have been bound by the fetters; but if he died, living the granter, the fetters would have been discharged.]

Exactly; and so in this view the question becomes most serious. If Isobel, and all before her, had died, living the granter, and she had left a son, could he, by possibility, have been institute; and yet, on the principle of the decision, he must be; and he, and every one entitled to take on failure of the institute, *ex facie* of the deed, as the first disponee in existence, would be entitled to evacuate the fetters, though directed against them *nominatim* perhaps.

But even if Isobel were held to be a conditional institute, upon the authority of the opinion given by the majority of the Judges in Colquhoun *v.* Colquhoun, she should have brought a declarator to establish her right as such. She was not entitled, *de plano*, to use the procuratory or precept, in which James

Russell was the only party named. She ought to have cleared her title by shewing the failure of the parties previously called, upon the condition of which failure her right depended. This effect, it is said, was accomplished by her service to James; but a service is a proceeding entirely *ex parte*, and never can be used for the discovery of a fact. If entitled as a substitute, the party's right is in a sense vested, that no one can interfere with it, and yet he can neither take infeftment nor dispone without expeding a service; so, also, if he is entitled as conditional institute, must he clear his title by declarator before he can exercise the right which the deed gives him.

On the whole, if Isobel Russell be viewed as a substitute, service was necessary to complete her right; and that service, according to the authority in the cases of Gordon and Peacock, should have been to Elizabeth Fogo; but having been to James Russell, her personal title was bad, and could not be the basis of a good feudal title, and so the entail of 1811 is inept. If, on the other hand, Isobel Russell be viewed as conditional institute, declarator was necessary to complete her personal right; and here, again, her feudal title was defective, and the entail inept.

Mr Pemberton and Mr Anderson, for the respondent, were heard at great length.

Lord Cottenham. — When this case was last before the House, it did not appear so clearly as it does now, that the title of the defendant was good as against the claim of the pursuer, in any way of viewing it, and whatever might be the right conclusion upon the question of the feudal title, as to which great difference of opinion has been entertained by the Judges of the Court of Session. It was supposed that the case of Peacock threw some difficulty in the way of the defender's title, so far as it depended upon the personal right of Isobel Russell; and if

that supposition had proved to be correct, it might have become necessary to come to some decision as to the controverted question, whether Isabel was to be considered as a conditional institute, or a substitute; and, as depending upon that, whether her service to James was effectual.

In order, therefore, to secure the means of coming to a conclusion, upon the return of the remit, the House was desirous of procuring the opinions of the learned Judges upon the feudal title of Isobell Russell, as well as upon her personal right.

I cannot but regret, that this requisition in the remit should have occasioned much additional, and, as it now appears, unnecessary trouble to the learned Judges, although it has been the means of eliciting much valuable learning, and many important observations, upon a point of much doubt, which cannot but be highly useful when it shall be necessary to pronounce a decision upon that subject. It is not necessary to do so for the purpose of deciding this case, and it would therefore be, in my opinion, very inexpedient to express any decided opinion upon it. If, indeed, any opinion so expressed could have the effect of a judgment of this House, and so become binding for the future, it might be very convenient to establish a rule to regulate the conduct of the profession in all cases which may hereafter arise; but it might be of dangerous consequence to existing cases, and might possibly affect titles which have hitherto been thought secure: but no opinion so expressed would have the effect of a judgment of this House, or would be of more weight than might be thought due to the opinion of the individual Peer who might express it; but it might, and probably would, raise doubts, without the power to solve them, and encourage litigation in existing cases, without establishing any rule for those which may hereafter arise. I shall therefore confine the few observations I propose making, to explaining the grounds upon which it appears to me that judgment must be given in favour of the defender, whether

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Isobel Russell ought to be considered as a conditional institute, or as a substitute.

It seems to be quite certain, that the fee did not remain in Elizabeth Fogo, but that, upon her death, the right vested in Isobel Russell, by the predecease of those who stood before her in the succession; and that the only question is, whether she took as substitute, James Russell, who died before her, being the institute; or whether, she being the party to take upon the death of Elizabeth, is to be considered as conditional institute. But all the Judges concur in this, that whatever may be the more correct character of her title, the personal right in her was complete and sufficient to enable her to dispose of the estate as she did; and under which the defender claims, and thereby effectually to deprive the pursuer of all right. If James was properly the institute, and Isobel a substitute, then Isobel's personal right was, upon the death of Elizabeth Fogo, complete, and was properly feudalized by her service to James; or, at all events, her personal right was sufficient to enable her to give to the defender an effective title, as against the pursuer. If, on the other hand, Isobel was properly a conditional institute, then also her personal title was equally valid and effectual against the claim of the pursuer. There does not seem to be sufficient of authority, or any thing of principle, to justify the idea, that she ought to have obtained a declarator of her right; or any ground for contending, that if such a proceeding was proper, the omission of it, or the delay in applying for it, could entitle the pursuer to the relief he prays. The title to the declarator must be founded upon a right to the estate.

Finding, therefore, that upon either of the two supposable positions of Isobel's title she was by law enabled to confer upon the defender a good title as against the pursuer, the interlocutor appealed from, so far as it assoilzies the defender, must be affirmed; but for the reasons before given, it appears to me to

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be unnecessary to express opinions which are not required for t adjudication of the rights of the parties. I therefore think, th so much of the interlocutor of the Lord Ordinary, as states t judgment to be founded upon the feudal title of Isobel, s properly recalled.

It seems to have been thought by some of the consul Judges, that the Inner House intended to act upon this princi and to have therefore recalled the findings in law of the L Ordinary, and did not propose to express any opinion of th own upon the position of Isobel's title. If such was their int tion, this interlocutor does not, I think, carry it out, and be of opinion, that such would have been the right course to h pursued, and to avoid all doubt upon that head, I suggest your Lordships to vary the interlocutor of the Inner House cancelling the findings in point of law, and substituting th words: — " It appearing, that in whatever character Iso " Russell became entitled to the estate in question, she had " power to dispose of the same, as she did dispose thereof, and th " the title of the defenders deduced therefrom is a good and va " title as against the claims of the pursuer," and to affirm the n

This alteration in the interlocutor would not protect the pellant against the costs of the appeal, if the other circumstan of the case were such as to make this a proper case for mak the appellant pay costs; but, without in the least wishing shake the wholesome rule, that an appellant who fails sho generally be ordered to pay costs, I think that this case ou to be one of the few exceptions to the rule; for although ther a very general concurrence of opinion against the claim of pursuer, there has been an evident difference as to the grou upon which the conclusion has been founded.

I move your Lordships, therefore, that the interlocutor appe from should be affirmed with the alteration I have suggested, that there should not be any costs given of the appeal.

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Lord Campbell. — My Lords, after what has been suggested by my noble and learned friend, I will confine myself to a simple assent to the decree that he proposes. I confess, my Lords, that after a very attentive consideration of this case, I had formed an opinion which I was prepared to express, but from my sincere deference to what has fallen from my noble and learned friend, I abstain from doing so. I thought that we might possibly have laid down a rule that might be useful, and that, to prevent all possibility of its being called an *obiter dictum*, we might have inserted it in the judgment; but my noble and learned friend having a different opinion, I again say, with the utmost unaffected deference to his better opinion, I abstain from doing so. I will only add, that I entirely agree in the alteration which my noble and learned friend has proposed in the interlocutor.

Lord Brougham. — My Lords, I fully agree in what my noble and learned friend who has last addressed your Lordships has said. I agree with him, also, in adopting the course suggested by my other noble and learned friend, because I think it is a perfectly safe course. If we had gone beyond that, we should have done, in my opinion, an exceedingly good service to the Scotch law of real property, and to Scotch conveyancing. After studying this case with the greatest attention last session, I was prepared to give my opinion upon it, and had prepared a judgment taking this ground, and going farther than the case absolutely requires us to do, which, generally speaking, I freely admit, is not a good or wholesome course to take, and is in general much to be avoided. Nevertheless, I am aware of this, that it is a course expected from us by the Court below: they wish that we should take it into our own hands, there being a very great difference of opinion,—though not upon the point itself upon which the cause now under appeal turns, — but a very great difference of opinion on the grounds upon which they came to that decision, which have been severally adverted to by my noble and

learned friend, — a very great difference of opinion, consequently, upon some of the most important, most radical, most fundamental doctrines of the law of real property, upon which, not only the decisions of Courts, but the practice of conveyancers, must be regulated, and must depend; and I confess, that knowing that that is the most systematic and the most elaborate part the Scotch law system of jurisprudence, upon which there is the most of learning, and the most of principle and of system, have been moved with the greatest astonishment at finding some of the points which arose still to be so entirely *in dubio*, that one cannot well conceive how a system of conveyancying can exist usefully and safely for titles, with so much doubt and discrepancy as appears to exist. We have, however, taken the safer course which I do not at all object to. I defer to the opinion of the noble and learned Lord who moved the judgment. It is quite sufficient if one of the three Lords, who heard this case, is against going farther. If my noble and learned friend who has just spoken, had formed that opinion, and my noble and learned friend near me and myself had been for going farther, as we were rather expected and wished to do, I still should have said that that was a sufficient ground for adopting the safer course which we are now taking, by going only to the extent we are now doing.

Whether or not it may be fit to have some declaratory act passed, or some measure taken, upon the subject, for clearing up these doubts, and settling the principle of conveyancing, is another question, and a question upon which I give no opinion nor have I formed any; but I am quite sure we shall not do so unless we hear that it is required by the profession, and by the Scotch Courts. Till then we must wait. All we do now, is to affirm the interlocutor, with the alteration suggested; and in that alteration I entirely agree.

With regard to the costs, while I fully concur in the gene-

rule, that the party failing being the appellant, should pay the costs, yet this, I think, is a case where there should be a deviation from the general rule.

Lord Campbell. — In the meantime, they must continue to make up their titles in three different ways.

Lord Brougham. — No doubt. And that is the mischief of it, and without knowing exactly in which way.

Mr Anderson. — I think this judgment will exclude one way.

Lord Brougham. — I can shew you another. It must be observed, that the opinion I had formed would not have gone to shake any thing that was established, but to shew that I do not comprehend how those principles had been established. If this had been *res integra*, it could not have been sanctioned; but that is not for discussion now.

GILBERT GOLDEN — ARCHIBALD GRAHAM, MONCRIEFF, and WEEMS, Agents.

[18th August, 1843.]

JAMES RENTON, *Appellant.*

PHILIP ANSTRUTHER, Esq., and Others, *Respondents.*

Titles — Tailzie. — A procuratory of resignation, executed by a part uninfeft, having right to a previous unexecuted procuratory mad by a party infeft, coupled with obligation to infeft, and an assigna tion to writs and evidents, rights, titles, and securities, will operat an effectual conveyance of the lands to be resigned under all th the conditions; and if the procuratory be made upon condition fenced with the usual clauses, it will form an effectual tailzied con veyance.

THIS case was heard at great length in the year 1842, and fo the reasons which will be found in 1 *Bell*, 129, was remitted t the Court of Session for the opinion of the whole Judges of th Court. These opinions, which have not been reported elsewher were delivered in the following terms:—

" After hearing the cause very fully argued on the remit fro " the House of Lords, we are of opinion, that the judgment " the Second Division of this Court, now under appeal, was we " founded in the principles and authorities of the law of Sco " land; and is such as we should have held ourselves bound " pronounce, if the case had been originally before us.

" From the course and tenor of this last argument, we obser " that the matters in dispute between the parties have be " considerably narrowed since the cause was formerly discuss " and decided in this Court; and that the only propositions " which the appellant now insists are the two following: " *First*, That the deed of 1810 is ineffectual, as not containi " any proper conveyance of the right to the lands, which

"admitted to have been in the granter at its date; and, *Second*, "That the destination in that deed was, at all events, revoked "by the subsequent deed of 1814, which is obviously defective "and inept, as a separate or independent deed. The last of "these points was very little discussed; and, as it appeared to "us, not much relied on by the appellant; and certainly the "weight of his argument was directed entirely to the first.

"Now, with reference to this first point, we think it material "to observe, that it is now fully admitted by the appellant, and, "we think, necessarily and properly admitted —

"*First*, That a party uninfeft, and having only such a "personal title to lands as was confessedly in Sir Alexander "Anstruther in this case, under his sister's disposition of 1808, "may yet make an effectual entail of such lands.

"*Second*, That, for this purpose, it is not necessary, nor even "perhaps strictly proper or correct, that he should use disposi- "tive words, or in any way profess directly to convey or make "over the property of the lands themselves; and that it is "perfectly sufficient, if he assign and convey, in any habile "manner, his own personal right to them; together with such "writs and documents as may enable the assignee to make it "real. And,

"*Third*, That an unexecuted procuratory of resignation is, in "its own nature, an assignable instrument; and may be as "effectually carried by a general assignation of writs, titles, and "evidents, (where there is nothing in the deed containing it to "exclude such a construction,) as if specifically mentioned or "described.

"Holding all these points, as we do, to be in themselves in- "disputable, and seeing that they are no longer questioned by "the appellant, his argument upon the first and leading branch "of the case comes shortly to this: — The deed 1810, he "observes, has four separate parts, — 1*st*, An obligation to

" infeft, under the conditions of the entail; 2*d*, A procuratory of " resignation; 3*d*, A precept of seisin; and 4*th*, A clause assign- " ing writs, titles, and evidents. Now, the obligation to infeft, he " maintains, has not been carried into effect in the only legal or " effectual way, since the granter, or his heir-at-law, did not " themselves make up titles, and then convey to the heirs of " entail, and, therefore, is now altogether unavailing. The pro- " curatory and precept, again, are both represented as utterly " inept, and mere nullities, as being granted by a party " uninfeft; and, therefore, the whole case of the respondents " must rest on the assignation to writs and evidents; and this, " he says, is a mere accessary or subsidiary clause, which cannot " subsist to any practical effect, except by reference to some " separate and substantive conveyance of the personal right, for " the completion and security of which alone, he contends, it " was inserted; and he refers to the cases of Don, Hamilton, " and Strachan, in support of this last and most important of " his propositions.

" We hold the whole of this argument to be fallacious, both " in its premises and its conclusion. But, in order to clear the " grounds of this opinion, we think it right, in the first place, to " say a word or two on what we conceive to have been the true " import and amount of the decisions now referred to, and par- " ticularly those in the cases of Don and of Hamilton, on which " the appellant chiefly relies.

" What was settled then by these two decisions we apprehend " was this, and no more, — that where, in a regular deed of con- " veyance by a person infeft, the subjects to be conveyed are " distinctly specified and set forth in a proper dispositive clause, " (or other sufficient clause of conveyance,) the terms of that " leading clause shall be taken as the measure of the rights so " given; and the extent of the grant thus constituted shall not " be varied, enlarged, or restrained, by the terms of any sub-

"sequent clause of assignation of writs and evidents, which, "when annexed to such a cardinal disposing clause, must be "viewed as subsidiary only, and be construed and have effect "only in subordination to that substantive clause of conveyance, "and not according to the literal import of the words in which "it may be expressed. These, therefore, were truly questions "of construction as to the true meaning and effect of the whole "instruments relied on: and the judgments proceeded on a "comparison of their different clauses with each other, and a "due consideration of which of them were to be regarded as the "governing, and which the subordinate clauses. They were "mere illustrations, in short, of that very elementary and "familiar principle or maxim in the law of Scotland, that it is "the exclusive province of the dispositive clause, in all instru-"ments where there is such a clause, to define and settle what "it is that is conveyed; and that no other clause, intended "substantially for different purposes, shall ever be so construed "as to control or limit its operation; and they, therefore, leave "quite untouched the more general question, as to the effect of "an assignation of writs and evidents, where it stands alone, "and not in connection with any such overruling antecedent.

"The slightest consideration of the cases themselves must "make it apparent that no other question was raised, or could "be decided, in either of them. In the latest of them, that of "Hamilton and Lady Montgomery in 1834, there was a regular "feu-disposition by a party infeft, expressly disponing certain "lands and teinds with procuratory and precept, but with a "special stipulation that the disponee should relieve the disponer "of all future augmentations of stipend, on being allowed to "retain a part of his feu-duty, to answer such augmentations; "and then there was a general assignation of writs and evidents "in common style. In the course of time augmentations were "laid on the teinds so conveyed, to a greater extent than the

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" feu-duties allowed to be retained; and then, at the distance " of upwards of a century from the date of the conveyance, the " disponee having discovered that his author held an obligation " of absolute warrandice against all augmentations, from a third " party, and actually stood infeft in certain lands in security of " that warrandice, attempted to maintain, that this general " assignation of writs and evidents was sufficient to give him a " title to found on that disposition to the warrandice lands; " and, under it, to claim an immunity from augmentations, " palpably beyond and inconsistent with that to which he was " restricted by the clear and unequivocal terms of his own " disposition. The Court, accordingly, had not the least " difficulty in finding that, in such circumstances, it would be a " mere perversion and abuse of the clause of assignation, to hold " that it imported a grant, not only beyond, but plainly contra- " dictory to, the conveyance, which it was only meant to secure.

" The earlier case of Don, in 1814, proceeded indisputably on " the same general ground, of the impossibility of controlling or " enlarging a specific grant, constituted by leading clauses of " conveyance, by the terms of a relative assignation of writs and " evidents, however comprehensive those terms might be. It " happened, in that case, that there was no proper dispositive " clause, the conveyance to the heirs of entail being in the form " of a procuratory of resignation by a proprietor infeft: but such " a procuratory, as Lord Stair has observed, 'has in it the " 'effect of a disposition,' and is, in fact, a full and direct " disposition of the subjects resigned, to the superior in the first " place, to whom it expressly 'surrenders, upgives, and delivers " the subjects resigned; and in the next place, and in substance " to the heirs in whose favour he is required to grant new infeft- " ment. It is, accordingly, quite settled, that the origina " specification in a procuratory, of the subjects resigned, wher " the conveyance is completed in this form, is as exclusively th

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" measure of the grant, as a similar specification in the disposi-
" tive clause is, where the title is meant to be made up under a
" precept of sasine; and, accordingly, the specification and
" description of these subjects in the charter of resignation is
" always and necessarily identical with that in the procuratory,
" which is, in this respect, its sole pattern and warrant. Now,
" in this procuratory, which constituted the entail of Finlaystone
" in 1708, the lands of that name alone were conveyed, without
" any mention of teinds; though the entailer at the time held a
" lease or tack of those teinds for a period of upwards of two
" hundred years; and the same specification, of lands only, was
" repeated in the charter of resignation, and all the subsequent
" titles. There happened, however, to be, in this original deed,
" a clause assigning all writs and evidents, &c. 'of and concern-
" 'ing the said lands, and teinds thereof;' and in a very copious
" enumeration of these writs, there were there mentioned, 'all
" 'tacks, assedations, subtacks, prorogations, and others what-
" 'soever, of and concerning the said lands, and teinds thereof,
" 'made or granted to me by authors,' &c. And, in 1812, an
" action was at last brought, for having it found that the said
" tack was effectually conveyed to the heirs of entail by this
" assignation.

" There could not certainly be a stronger case for questioning
" the absolute supremacy of the proper dispositive or conveying
" clauses, in fixing the extent of the grant, and preventing its
" being enlarged by any accessary provisions; and accordingly,
" Lord Balgray, who was very learned in conveyancing, when
" the case first came before him as Lord Ordinary, found that
" the right to the tack was effectually conveyed, by this clause,
" to the heirs of entail. But, on farther consideration, the Court,
" and at last unanimously, altered this judgment; and in respect
" the heirs could take only what was resigned by the procuratory,

" and given anew by the charter of resignation, found that ' the " ' general clause of assignation to writs and evidents annexed to " ' the procuratory of 1708 was not a due and sufficient convey- " ' ance of the tack of teinds in question, to the heirs of entail.' " The case is very imperfectly reported; but the ground of " decision cannot be mistaken.

" Strachan's case, in 1776, was different in its circumstances, " but rested on precisely the same principles. Aird, a proprietor " infeft, had, in that case, sold certain lands to Stewart by a " mere minute of sale, in which he bound himself afterwards " to grant disposition with procuratory and precept; but had " not done so. In that situation, Stewart borrowed money from " Whiteford; and in security merely for the sum lent, thought " fit to grant him a disposition of these lands, with a general " assignation to writs and evidents. On this, Whiteford, assum- " ing that the full right to the minute of sale was conveyed to " him by this assignation, raised an adjudication in implement " in his own name, against Aird, who was noway his debtor, " and proceeded to adjudge the lands; when a reduction of that " proceeding was brought by Strachan, as trustee for Stewart's " other creditors; and the Court — holding that it was absurd in " one who had a right merely in security, and apparently for a " small sum, to pretend that a general assignation of writs, in " corroboration of such security, could give him a right to com- " plete the inchoate titles of his debtor, and to sue his authors, " in his own name — set aside his adjudication, and found that " the right to the minute of sale was not carried by that relative " assignation, but remained with Stewart, for the benefit of his " creditors in general. The grounds of decision are very dis- " tinctly set forth in the argument for the successful party, in " the report of Lord Hailes; and, without looking at that argu- " ment, it is impossible to make sense of the very imperfect note

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" of the opinions delivered when judgment was given; though, " with this key, their true bearing and import are sufficiently " evident.

" There is nothing, therefore, in any of the decisions referred " to, that imports more than that an assignation to titles, where " it is made in corroboration of a precise grant, can carry " nothing beyond what is included in that grant; or that affords " any ground for holding that such an assignation, when not con- " nected with, or controlled by, such a grant, may not give the " full right constituted by such titles to the assignee. And, in- " deed, when it is considered, that in all these cases there were " these words and clauses of direct disposition, to which the " appellant attaches so much importance, and the combination " of which with an assignation to writs and evidents, he distinctly " admits to constitute a complete conveyance, it must be at once " apparent, that the decisions referred to, must have proceeded, " not upon any inherent insufficiency in these assignations, to " effect such a conveyance, but solely on the disconformity be- " tween the terms in which they were conceived, and those of " these other leading clauses: with which, if they could only " have been reconciled, there must have been an end of all ob- " jection. Nor was it possible for him to have avoided such an " admission; since it is matter of notoriety, that by far the " greater part of conveyances made on open charter — which " are probably equal in number to half of all the conveyances " made in Scotland — have been completed, and now stand, upon " nothing but such dispositions by parties uninfeft, with relative " assignations to the means of obtaining infeftment.

" But is it to be understood, then, says the appellant, that a " mere assignation to titles is sufficient, of itself, to carry the " personal right to the lands, to which they relate, without any " substantive or separate conveyance of that right? and, conse- " quently, to entitle the assignee to an unexecuted procuratory

" of resignation, to vest himself with the real right, by obtaining " an entry from the superior? We do not know that we are " particularly called upon to answer this question, since, in our " apprehension, the case before us does not depend on the " answer. But, as it may bring out more clearly the principles " on which we think that it does depend, we may take occasion " to observe, 1*st*, That we conceive that an unexecuted procura- " tory of resignation constitutes a mandate which the superior is " not at liberty to disobey; 2*d*, That, though undoubtedly " assignable at the pleasure of the holder, we do not think that " it should pass by mere indorsement, like a bill of exchange; " or even by such a vague and inexplicit assignation as may " leave it uncertain for what purposes, and to what limited or " unlimited extent, it is meant to be conveyed; but, 3*d*, That " where the ends and purposes for which it is made are distinctly " expressed, and are in no way repugnant with each other, or " with any thing else in the deed by which it is effected, we " see no reason to doubt that such an assignation will carry the " whole right which the cedent held under that procuratory, and " be of itself sufficient to entitle the assignee to an entry in his " room.

" Suppose a party, holding only a personal right to lands, " should execute a deed, in which he first recited that he had " sold them for a certain price, and that the purchaser had now " made tender of that price, and required a conveyance in return, " and then proceeded to say, 'and whereas I am ready and " 'willing to comply with the said requisition; but, seeing that I " 'am myself uninfeft in the said lands, and consequently unable " 'either properly to dispone the same directly, or to grant any " 'effectual procuratory of resignation or precept of sasine in " 'regard to them, I hereby, and in and for implement of the said " 'bargain and sale, assign and make over to the said A. B. a " 'certain unexecuted procuratory of resignation, (dated so and

" ' so,) granted in favour of me, and my heirs and assignees, by
" ' the party last vested and seised in the said lands; to the end
" ' that the said A. B. may instantly vest himself with the full
" ' right to them, by forthwith executing the same in favour of
" ' himself, and such heirs and successors as he may choose to
" ' appoint; and I hereby farther desire and require my superior
" ' to receive resignation from the said A. B. (or his procurators,)
" ' as my full and lawful assignees, in and to the said procuratory,
" ' and to grant new infeftment thereon to him and his heirs
" ' accordingly.' Here would be a deed which clearly conveyed,
" and professed to convey, nothing but the procuratory of resig-
" nation alone; and yet we are unable to see any ground on
" which, consistently with the fundamental maxim that such
" procuratories are assignable, any doubt could be raised as to
" its sufficiency to pass the full right to the property.

" But, though we have said so much on the hypothetical case
" of a naked and detached assignment to title-deeds and evidents
" alone, it is scarcely necessary to observe, that in our view of
" the present case, the clause relied on can neither be considered
" as importing an assignment to writs only, nor as standing by
" itself, and without connection with other important clauses.
" On the contrary, we conceive, that while there is ground for
" holding that it contains an express assignment to the cedent's
" personal right, as well as to the written titles in his person, we
" hold it to be clear that it refers to, and is to be taken in con-
" junction, — 1*st*, with the obligation to infeft, and 2*d*, with
" the procuratory of resignation — the tenor of both which is not
" only consistent with the largest and most beneficial meaning
" and effect it admits of, but necessarily requires it to be taken
" with such large meaning and effect. It is upon this complex
" view of the whole structure and import of the deed that we
" chiefly rest our opinion; though it may be right to premise a

" few words on the effect of certain expressions which are to be " found in the clause itself.

" We understood it to be fully conceded in argument by the " appellant, and, indeed, it could not well be disputed, that if " the clause in question, standing where it does, had only, after " assigning the whole writs, titles, and evidents of or relating " to the lands, contained these few additional words, 'together " 'with all right, title, and interest which I now have, or can in " 'any way pretend to have, in and to the said lands themselves,' " the title of the assignee would have been perfect, and his right " to execute the assigned procuratory free of all objection. But " what are actually the words of the clause as it stands? It does, " in point of fact, "assign and dispone, under the conditions, " provisions, and clauses, irritant and resolutive, above written, " all and sundry writs, evidents, rights, and title-deeds, of or " relative to the said lands and others. There is here, there- " fore, an assignment, in express words, not only to all the writ- " ten titles in the person of the granter, but to his whole rights " to, or in relation to, the lands; and they are not only assigned, " but disponed also, and with and under the whole limitations " of the entail — a qualification which was necessary and appro- " priate, if the right itself was meant to be assigned, but utterly " without meaning as to a mere conveyance of written papers. " Why, then, should not both parts of the assignment be effec- " tual?

" The appellant thinks it a sufficient answer to say, that the " words referred to are mere words of style — that the word " 'rights' in such a clause is but a synonime for rights or titles, " and that in the case of Don, and in other cases, these, and " even still stronger words, were accordingly held insufficient to " carry more than the written documents: and to a certain " extent this answer, we think, must be admitted. The words

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"certainly are words of ordinary style, and are not unfrequently "found where it is apparent, from the context, that nothing "more than a relative assignment of writings was contemplated. "But where there is no such conflict between their natural "meaning and an overruling context, we do not know upon "what principle this, their plain and natural meaning, should "be refused to what are called words of style. When first "introduced into such styles, they certainly had their appro- "priate and ordinary meaning; and though upon some occasions "they may now be used where effect cannot be given to it, there "seems no reason why they should not retain it, whenever that "meaning is in full accordance with all the other indications of "intention in the deed. We are now considering the clause as "if it stood alone, uncontrolled by, and unconnected with, any "other; and the question is, whether, on that supposition, effect "should not be given to the express conveyance it contains of "'rights' to lands, as well as of writs relating to them? And to "this it is obviously no answer, that effect has been systemati- "cally denied to those, and to still stronger words, where their "disconformity to other and more authoritative clauses made "this unavoidable. In the case of Don, it is certain that far "stronger words were on this account disregarded: For there, "an express assignation of 'all tacks of teinds' was found "ineffectual to convey a tack of teinds, confessedly at the "granter's disposal; though it was beyond all question, that if "these words of assignation had stood alone, in a substantive "and independent clause, or unconnected with a leading "conveyance relating to lands only, and not to teinds at all, "effect could not possibly have been denied them. We incline "to think, therefore, that under the express words of this clause, "as well as by its plain implication, the granter's personal right "to the lands was sufficiently conveyed, as well as the titles and "evidents, by which it might be cleared and completed.

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" But though this is the view which we should be dispo
" to take of this assignation clause, if we were to consider it
" separate from, and independent of, any other, we have alre
" intimated that we are not of opinion that this is truly
" situation or character in which it presents itself. We thin
" clearly a relative, and, in some sense perhaps, a subordin
" and accessary clause: but if it be accessary and subordin
" then most certainly the principle clauses to which it stands
" that relation, are in no respect inconsistent, but in perf
" accordance with the largest and most extensive sense that
" be given to its terms. The object and purpose of the d
" was, beyond all question, to settle and entail the lands wh
" were at the disposal of the granter, in favour of a certain se
" of heirs; and it is worth while to consider how clearly
" closely all its different parts are connected with, and made
" bear upon and support each other. The obligation to in
" the heirs specified is the first; then, and with exp
" reference to that obligation, namely, as the deed bears, '
" 'accomplishing the said infeftment by means of resignatio
" comes the procuratory of resignation for new infeftment
" their favour; and finally, and for the purpose (as we read
" of enabling his procurators effectually to execute this mand
" and obtain such new infeftment, there is 'the assignation
" 'all writs and titles' in the person of the granter; includi
" beyond all question, his sister's disposition of 1808, (wh
" was in fact his only available title,) and the unexecuted p
" curatory of resignation therein contained. According to
" conception of the matter, this short view of the import
" tenor of the whole deed, should leave as little doubt of
" general efficacy, as of the substantive and separate validity
" each of its connected parts. But a word or two may now
" added as to each of these.

" We do not understand upon what ground the appellant h

"the obligation to infeft to be of no avail to the respondents. It is easy enough to see why he represents the procuratory and precept as null and inept — as flowing from one who was not himself infeft in the property. But it certainly requires no infeftment to enable one who has a full personal right to lands, effectually to bind himself and his heirs to give infeftment to those to whom he proposes to convey them; nor can it be doubted that such an obligation will vest most important rights and powers in those in whose favour it is conceived. It is, indeed, in very many cases, by and through such an obligation alone, that the parties so favoured can render the grant to them effectual, even where they have received a formal disposition with procuratory and precept from one whose right is but personal. The procuratory and precept of such a party are plainly incapable of precise execution, and, as direct means of access to the property, are truly altogether inept and unavailing. But, in truth, so also is his direct disposition of the lands. One not infeft cannot effectually dispone. The property is not in him; and he cannot, therefore, make over directly any proper right of ownership to another. He has himself merely a personal right to claim sasine from the bailie of the former proprietor, under the precept of that proprietor; or a new charter from the superior, under his procuratory of resignation; and those personal rights or claims he can no doubt validly assign: but he cannot give over the lands themselves. The formal clause of disposition may indeed be held to infer an assignment of the personal right, or to imply an obligation to infeft, where that is not expressed; but at best it can do no more; and if there be no conveyance of the unexecuted procuratory or precept in his person, neither that nor his own new precept and procuratory will be of the least avail to the disponee. The obligation to infeft, therefore, may often be all that is really

" operative or effectual in the deed; and if the granter, or hi
" heir-at-law, do not choose voluntarily to fulfil it, his onl
" remedy is, by adjudging in implement of that obligation: fo
" it is always on this obligation alone, whether expressed o
" implied, that this important diligence must proceed. — S
" substantively and exclusively efficacious is that leading part o
" the deed, which the appellant now represents as of no practica
" importance.

" But if an obligation to infeft be thus sufficient, of itself, t
" let the party into the right of the lands, by means of adjudica
" tion founded on it alone, where there is no assignation t
" writs and evidents, why should it not be sufficient without an
" such procedure, when it is coupled with such an assignation
" which puts it in the power of the party himself to implemen
" the obligation, and plainly makes it unnecessary to go bac
" to the granter, or his heir-at-law, either for any voluntary, o
" legal and constructive fulfilment of it? If a good right, i
" short, can be made up, on that obligation to infeft alone, b
" the party to whom it is granted calling on the granter t
" execute in his favour any procuratory which may be in hi
" person, where there has been no assignation of that procura
" tory — how should there be any difficulty in the favoure
" party completing the right himself, where, in addition to thi
" obligation, there is an express assignation to him of tha
" procuratory, for the very purpose of securing implement of th
" obligation?

" Laying aside for the present the new procuratory, whic
" in the deed of 1810, is locally interposed between the obliga
" tion to infeft and the assignment to the original procurator
" and holding the former, in the meantime, as entirely null an
" inoperative, (which is the worst that can be said of it,) s
" how the deed would stand, when the two remaining membe
" of it, of which we are now speaking, are brought into juxt

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"position. It would then read substantially as follows:—'Being "'resolved to entail my lands of Caiply,' &c. 'on the following "'series of heirs, and under the conditions and limitations "'underwritten, I hereby bind and oblige myself, and my heirs "'of every description, duly to infeft the following persons, "'namely,' &c. 'in the said lands,' &c. 'And in order that, in "'the event of my not myself fulfilling this obligation in my "'lifetime, they may have it fully in their power to take imple-"'ment of it for themselves, I hereby assign and make over to "'them all the writs and titles that now stand in my person; "'and especially the procuratory of resignation contained in "'the disposition by my sister in 1808; to the end that they "'may execute the same in favour of the heirs herein before "'mentioned, and under the provisions foresaid.' Now, we "think it impossible to doubt that this would be an effectual "deed; and though these are not the actual words of the entail "of 1810, we think it can be as little doubted that it has words "fully equivalent; and that this is truly a mere paraphrase and "abridgment of what it substantially contains: and therefore "we are of opinion, that the obligation to infeft, taken along "with the conveyance of all that is requisite to obtain infeftment, "is *per se* sufficient to effect a complete conveyance and settle-"ment of the property. We have here, in short, upon this "separate view of the question,—1st, A confessedly valid "obligation to infeft; 2d, A valid assignment to the proper "warrants for infeftment; and, 3d, An infeftment regularly "completed upon these warrants. The appellant now seeks to "reduce and set aside all these; and we are of opinion that one "and all of them are unimpeachable.

"But then there is, over and above, the new procuratory of "resignation. Now, it is quite true that this, standing by "itself, did not admit of direct or proper execution, so long as "the granter was uninfeft; and that it could not, *per se*, vest

" any available right in the respondents. But it does not stan
" by itself; and in the connection in which it does stand, it is
" far as possible from being a nullity.

" First of all, as has been already observed, a procuratory
" resignation is truly of the nature of a disposition. It i
" indeed, in form as well as in substance, a direct conveyance o
" the lands to the superior, for new infeftment to the heir
" specified; or, substantially, a conveyance to those heir
" mediately, and by the intervention of the superior. It i
" therefore, in itself a proper dispositive instrument; and whe
" the granter is infeft, it is accordingly undeniable that it mu
" be admitted to direct and complete effect, as such. But it
" conceded by the appellant, that wherever there is a prop
" dispositive grant, followed by a relative assignation to wr
" and inchoate titles, no way contradictory to the terms of su
" grant, the two together will give a complete right, althou
" the granter was not infeft; and could not, therefore, trans
" the property of the lands by any mere words of dispositic
" The use of such words has no doubt been held to impor
" disposition (or assignation rather) of the personal right, whi
" was all the granter had to give — as *majus includit minus*, —
" at all events, to constitute an obligation on him to make gc
" what he held out to the disponee: but still, whether
" dispositive words are held to apply to the lands themselves,
" to the personal right, or to both, or only to infer an obligat
" on the disponer, two things may be taken as certain, — fi
" that they will not of themselves make a complete conveyar
" unless they be coupled with a relative assignation to the me
" of completing it; and second, that when they are so coupl
" they will make such a conveyance. But if this be incont
" vertible where the deed begins by a direct disposition
" conveyance to the heirs, there seems no reason for holding t
" the rule should be different, where there is an equally effect

"and substantive conveyance to them, though only through the "medium of the superior. Where the granter is not infeft, "neither the one conveyance nor the other will, *per se*, give the "grantees any direct access to the property; but if the insertion "of such a conveyance will give full effect to a subsequent "assignation of writs and titles, in the one case, it is difficult to "understand why it should not do so also in the other. Looked "at nakedly, and by itself, there is but the form of a conveyance "in either case; and if it be undeniable that a procuratory of "resignation by a party infeft is as complete a conveyance, "though circuitously, as a direct disposition from such a party, "the same circumstances which will render the one effectual, "where there is no infeftment, would seem necessarily sufficient "to produce the same result as to the other.

"But there is a more simple and familiar view of the matter, "which probably led first to the adoption of the practice "followed in this case, and suggests a clear justification of its "legality. The original procuratory in Miss Anstruther's "disposition was in favour generally of her brother and his "heirs; but he wished the new infeftment to be in favour of a "particular series, and under the limitations of a strict entail. "This he might have unquestionably obtained, by himself "resigning on the original procuratory, and requiring the new "charter to be qualified according to his wishes and intention. "To make this requisition, however, with proper assurance of "its being accurately attended to, it was obviously desirable, if "not strictly necessary, that some written intimation to this "effect should be made to the superior; and, considering that "the only legitimate way in which a superior can be approached "with a view to a new investiture, is by procuratory of resigna-"tion, it will easily be understood, that this would naturally "occur as the most expedient form to be adopted. It is in "instruments of this description that the destinations and

" limitations of most entails have in fact been introduced; and i
" the granter had been himself infeft, there can be no doub
" that such would have been the course he would have followed
" and though he was not infeft, and could not therefore make
" procuratory upon which actual resignation, which was the firs
" step to the new investiture, could follow, there might seem n
" objection, but the contrary, to his making a second instrumen
" of that description the vehicle of his requisition for the nev
" destinations and limitations, under which it was to be ultimatel
" completed. No surer or more correct way could be devise
" for bringing that requisition to the knowledge of the superior
" who was bound to give effect to it; and though the instrumen
" itself could not accomplish the resignation, no inconvenienc
" could result from that, if another instrument perfectly fitte
" for that purpose was presented along with it. By the on
" instrument the old investiture was put an end to, and th
" lands effectually resigned; and by the other, the terms of th
" new were distinctly and authoritatively dictated.

" Nor will it appear, when the form and regular tenor of such
" a deed is considered, that there was truly any thing anomalou
" or inconsistent in this mode of proceeding. There were here
" no doubt, two procuratories of resignation, for the purpose o
" effectuating one new investiture; and though it may in on
" sense be true, as we have already stated, that it was th
" peculiar province of the one to effect the resignation, or
" place the lands in the hands of the superior, and of the othe
" to define the terms of the charter he was thereafter to issue,
" would by no means be correct to hold that the latter coul
" have no other operation; or in fact that it gave any direction
" which could not be substantially obeyed. It will be recollected
" that the form and substance of a deed of this kind, consists i
" a mandate or direction to certain procurators, whose name
" are all along left blank, and who are presumed to act, whe

" the mandate comes to be executed, as the nominees or procu-
" rators of the person then in right of the instrument. Now,
" though Sir Alexander Anstruther was himself uninfeft when
" he granted the procuratory of 1810 to certain blank manda-
" tories, he was at the same time the holder of the other procu-
" ratory of 1808, granted by a party who was infeft, also to
" certain blank procurators, who by that time had come to be
" his; and, in so far as they had any existence, (constructive or
" prospective at the time,) must be held identical with those to
" whom his own procuratory was granted. The sum of the
" matter, therefore, was, that he issued a mandate to these his
" procurators to resign the lands, by executing the former pro-
" curatory, which he had placed in their hands for that purpose;
" and that for new infeftment to the parties, and under the
" conditions which he had expressed in that second or supple-
" mentary mandate.

" In all this we see nothing incompetent, or inconsistent
" either with principle or with form. He had full right and
" power to order the execution of the original mandate of 1808,
" and to annex to that order any new destinations or conditions
" he chose; and we do not think it can be questioned, that he
" might give this order by his commissioners and mandatories,
" as well as directly; and this we conceive is truly all that he
" did. The procuratory of 1810, in so far as the actual resigna-
" tion of the lands is concerned, is a mere mandate, as we take
" it, to execute the procuratory of 1808 — the execution of
" which, though uninfeft, he had an undoubted right to direct;
" and, in this sense, there was no impropriety or usurpation of
" power, in directing his mandatories to resign the lands, which,
" though uninfeft, he could legally resign, or cause to be
" resigned, upon that original procuratory.

" It is in this way that, connecting the terms of this procura-

" tory with the clause of assignation with which it concludes,
" think the whole instrument may be reconciled, both with es
" of its separate provisions, and with the strictest rules of cc
" veyancing. After directing his procurators to resign the lar
" in common form, and specifying the persons in whose favo
" and the limitations under which the new investiture was to
" taken, the granter, with a view, as it would seem, to the co
" veyance he was about to make of the former procuratory, a
" as introductory to that conveyance, proceeds to give 'f
" 'power, warrant, and commission to my said procurators,
" 'do all and every thing necessary for such resignation a
" 'new infeftment, which I could do of myself;' and then,
" the very next sentence, or rather continuously, and as part
" the same sentence, he 'assigns and dispones all and sund
" 'writs, rights, and title-deeds, of and concerning the sa
" 'lands;' as if he had said, in terms, — 'and to enable you
" 'to do, I hereby assign to you the unexecuted procuratory
" '1808, upon which I might myself, and but for this del
" 'gation to you, would have made the resignation.' If tl
" had been so said, we apprehend that no doubt could have be
" raised, either as to the true meaning of the procuratory
" 1810, or of the competency and propriety of every part of
" directions. But we hold that this is the true meaning a
" effect of what is said; and that the whole instrument must
" read as if this meaning had been fully and precisely expresse
" The two instruments, in short, we apprehend, were weld
" together, and consolidated into one, by the assignation
" the first, which occurs in the close of the last: and wh
" the heir's procurators, who were, of course, the procu
" tors in both, appeared to make resignation, with both
" their hands, their right and title to do so could admit
" no dispute, any more than their right to have all

"conditions contained in the last of them inserted in the new "charter.

"Considering the terms of the remit from the House of Lords, "under which our opinions are required, and the circumstances "in which that remit was made, we have thought it right to go "thus fully into the grounds and reasons on which it appears to "us that the law, to which effect was given in the judgment "appealed from, is founded. But, for the justification of that "judgment, and probably even for the satisfaction of the Court "of Review, it might have been enough to refer to the solemn "decision by which that law was settled, in circumstances pre-"cisely parallel, in the case of Lord Napier, and Livingstone, in "1763, and affirmed on appeal to the House of Lords, in March, "1765. It is now admitted that that case was exactly parallel "to the present; and this, indeed, is demonstrated by the "original documents, judgments, and pleadings, which have "now been printed, and will be reported to the House of Lords "along with these opinions. The circumstances were shortly "these: — The Countess of Findlater had merely a personal "right to the lands of Westquarter, under a disposition by the "last proprietor infeft, with procuratory and precept in favour "of her and her heirs generally; and, having no other title to "these lands, she, in 1705, executed a mere procuratory of "resignation, without either any clause of disposition of the said "lands, or of her personal right to them, or even any obligation "to infeft, and with a general assignation only, to writs, titles, "rights, and evidents, in favour of a certain series of persons, "and under the limitations of a strict entail. Infeftment was "afterwards taken by one of the heirs of entail, upon the joint "exhibition of this procuratory, and the precept of sasine in the "original disposition to the Countess, which was held to have "been effectually conveyed by the general assignation in the

" procuratory; and this entail was found, after a most anxi
" litigation, to be 'good and effectual against singular suc
" 'sors;' and separately, 'That the prohibitive, irritant,
" 'resolutive clauses in the Countess's entail of 1705 (viz.
" 'procuratory of resignation) were competently engrossed
" 'the sasine of 1706, though not contained in the precept u
" 'which it proceeded.'

" The appellant now admits that this case is exactly in poi
" and that it necessarily assumed and imported the fallacy of
" the arguments he now maintains. But he says, that the p
" suer in that case had no interest to maintain the gen
" insufficiency of the conveyance and destination effected
" these titles, as his own right was derived from them; and t
" the only question discussed, was with regard to the fetters
" limitations of the entail, and the competency of imposing th
" by the deed of a party uninfeft; while the larger question
" to the competency of establishing any effectual right to
" lands under such titles, was not properly in the view of
" Court. But though the pursuer might be willing to ev
" that question, it was, first of all, impossible to withhold it fi
" the view of the Court, to whom the whole documents w
" submitted and anxiously commented on; and next, it is pl
" from the pleadings now exhibited, that the defender had
" desire that it should not be fully considered; and, accordin
" it is brought forward and insisted on very strongly, at pa
" 15 and 16 especially, of the prints now referred to — wher
" is clearly shewn that, if the objections to the entail on
" alleged defects of the title were well founded, the whole c
" veyance by the Countess must necessarily be null, and
" right to the lands remain with her heirs-at-law. It was w
" this alternative, therefore, distinctly before them, that
" Court not only found generally that the entail 'was good a

" ' effectual,' but specially, that the fetters, contained only in the " procuratory, were aptly imposed, by being engrossed in the " seisin taken on the original precept in favour of the Countess, " though that precept contained no such fetters, and had only " been conveyed by the general assignation of writs annexed to " her procuratory.

" It is in vain, therefore, for the appellant to say that nothing " was settled by this decision except that a party uninfeft might " make an effectual entail. It was also very clearly settled, we " think, — 1*st*, That such a party might make such an entail by " a mere procuratory of resignation, without dispositive words, " or even without (which, however, we have here) any obliga- " tion to infeft; 2*d*, That such a mere procuratory, with a " relative assignation to writs and evidents, import, between " them, a complete conveyance to the granter's whole right to " the subjects resigned, and are sufficient, *per se*, to entitle the " assignees to make their right to them real, by executing the " assigned titles; and, 3*d*, That any destination or limitation " contained in the procuratory, may be competently inserted in " the seisin or charter taken on the assigned precepts or pro- " curatories, though no mention is made of such limitations in " those precepts or procuratories themselves. All these points " were fully argued and discussed in that case; and it is need- " less to say that the decision upon them effectually negatives " every one of the propositions now maintained by the appellant.

" When the frequency of the practice of transferring and " holding property on what is called open charter, indeed, is " considered, and its manifold advantages, in saving the great " expense of making up new titles, and the hazard of blunders " in completing them, it cannot appear wonderful that such a " compendious method of effecting a new investiture as was " followed in the case of Livingston, should have been frequently

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" adopted; and accordingly we have been very much impresse
" by the evidence which we think is afforded of the views entei
" tained at and previous to the time of that decision, of th
" principles and practice referred to, by certain passages of th
" pleadings for the defender in that case, and by one part
" cularly, at p. 16 of the print, where he says, 'It was neve
" 'doubted that a proprietor (of course uninfeft) might mak
" 'an entail by assigning his author's procuratories, as well a
" 'by granting his own. An immense number of such entail
" 'have been made; and a list is produced in process, of tailzie
" 'which contain no procuratories, but only assignations to thos
" 'of the tailzier's authors — some of them executed by familie
" 'of the first note, and likely, therefore, to be well advised
" This list, it appears, has unfortunately been mislaid; but it
" impossible to suppose that any misrepresentation of a docu
" ment actually on the table of the Court, could be made in
" pleading for such a party. We have no doubt, accordingl
" that the fact was as stated; and we may mention, that t
" same practice appears to have been followed, and was mu
" discussed, in a case between the Duke of Hamilton and t
" Earl of Hopetoun, with regard to the lands of Auld Cath
" in 1839. In that case, (exactly as in that of Livingston, a
" in the present,) Lord Hopetoun, being himself uninf
" granted a procuratory of resignation, without any disposit
" words, for resigning those lands in favour of a new series
" heirs, and under the limitations of a strict entail; with
" general assignation (as here) to writs and evidents. This w
" in 1733; and in 1784, the heir in right of these titles, havi
" vested himself with them (as here) by service both as heir
" line and of entail, took infeftment, for the first time, on t
" unexecuted precept which stood in favour of the entailer
" 1733, and which was held to have been validly conveyed

" the general assignations in the procuratory of that date — " inserting in the sasine so taken all the limitations of the entail, " and narrating as its warrants, that procuratory of 1733, 'and " 'assignation to writs therein contained,' with the services and " original precept itself. In short, it was an exact copy and " repetition at all points, of what had been done in the case of " Livingston; and though in this last case the correctness of the " title was most eagerly and pertinaciously impugned, the " objections to it were utterly disregarded, and their fallacy " necessarily assumed in the judgment which was given, though " the shape of the action did not admit of any special finding to " that effect.

" It only remains, then, to say a word on the appellant's " second proposition — that the whole destination of the deed of " 1810 was revoked by that of 1814 — which is confessedly " ineffectual as a separate conveyance. We are clearly of " opinion, that there is no ground whatever for this proposition, " — first, because there is plainly no general revocation of the " original destination; second, because there is no change " whatever on that leading part of it under which the present " heir has succeeded; and, third, because the deed of 1814, " instead of generally recalling that of 1810, has expressly " declared, that 'the foresaid deed of entail, in so far as not " 'altered by these presents, shall remain in full force, virtue, " 'and effect.'

" F. JEFFREY.
" D. BOYLE.
" JOHN HOPE.
" J. W. MONCREIFF."

" We concur in the above opinion, with this qualification " only, that we hesitate to say, that the use of the word " 'rights' in the assignation of writs, considering the context in

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" which that word stands, affords any argument of weight t
" would not have existed if that word had not been used in t
" assignation.

" J. H. MACKENZIE.
" A. MACONOCHIE.
" J. H. FORBES.
" JOHN FULLERTON.
" AD. GILLIES.
" J. CUNINGHAME.
" JOHN A. MURRAY.
" H. COCKBURN.
" J. IVORY."

These opinions were printed, and laid upon the table of House, along with supplementary cases for the parties, a this day, without farther argument being allowed, it v moved that the judgment should be affirmed, which v accordingly done by the following order.

Whereas this day was appointed for hearing counsel farther u the petition and appeal, wherein James Renton, accountant in Ed burgh, is appellant, and Philip Anstruther, Esq., second son of late Sir Alexander Anstruther, of Third Part, Knight, sometimes corder of Bombay, and Dame Sarah Anstruther, relict of the said Alexander Anstruther, are respondents,—which said appeal was on 28th day of February, and 1st day of March, 1842, heard *ex part* to Robert Anstruther, Esquire, of Caiplie and Thirdpart, in the cou of Fife, he not having answered the said appeal, though peremptc ordered so to do, — and which cause was with the consent of counsel on both sides, by an order of this House of the 1st da March, 1842, remitted back to the Second Division of the Cour Session, in Scotland, " to review generally the interlocutor c " plained of, with an instruction to the Judges of that Divisio " order the same to be argued, *vivâ voce*, before the whole Jud

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"including the Lord Ordinary, and to report their opinions thereon "to this House." And this House did not think fit to pronounce any judgment upon the said appeal, until after the said interlocutor should have been so reviewed, and the opinions thereupon should have been reported according to the direction of this order; and which opinions of the whole Judges of the Court of Session, including the Lords Ordinary, upon the matter so referred to them, were laid before this House on the 22d day of July, 1842. Counsel were accordingly called in, and counsel having been heard for the appellant, and counsel appearing for the respondents, the counsel were directed to withdraw: and on due consideration of the said opinions of the Judges of the Court of Session, and also, on due consideration had, of what had been offered on either side in this cause, it is Ordered and Adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutor therein complained of be, and the same is hereby affirmed.

JOHN BICKERTON. — SPOTTISWOODE and ROBERTSON, Agents.

[Heard *7th March* — Judgment *18th August*, 1843.]

ROBERT ANSTRUTHER, Esq. of Caiplie, *Appellant.*

PHILIP ANSTRUTHER, Esq. and Others, *Respondents.*

Tailzie. — Terms of irritant clause *held* to be sufficiently general — to comprehend all the acts prohibited, and not to be defective as giving an enumeration of particulars, and that a defective enumeration.

ON the 18th day of January, 1810, Sir Alexander Anstruther executed the deed of entail of his lands of Caiplie and Thirdpart[illegible], which was the subject of discussion in the immediately preceding case, (Renton *v.* Anstruther,) and which was made under the circumstances detailed in 1 *Bell*, 129.

This entail was fenced by prohibitory, irritant, and resolutive clauses, which were expressed in these terms: — "It is hereby "expressly provided and declared, that it shall not be lawful to, "nor in the power of, any of the foresaid heirs to alter this pre- "sent deed of entail or settlement, or the order of succession "hereby prescribed, or to do any act, or grant any deed, which "may import or infer any innovation or change thereof, directly "or indirectly, or to sell, alienate, wadset, dispone, or feu the "foresaid lands and others, or any part thereof, either irre- "deemably or under reversion, or to burden the same, in who- "or in part, with debts or sums of money, infeftments of annu- "rents, or any other burden or servitude whatsoever, or to co- "tract debts, or do any other fact or deed whereby the sa- "lands and others, or any part thereof, may be adjudged, or "otherwise evicted, in prejudice of the succeeding heirs of "entail, or any of them; excepting always, as is hereinaf- "excepted, and it is hereby declared, that all such deeds of c-

"travention, whether altering the course of succession, selling, "alienating, or burdening the foresaid lands and others, and all "debts contracted, deeds granted, and acts done by any of the "said heirs of entail, as well before as after their succession to "the foresaid lands and others, contrary to the above written "conditions and provisions, shall not only themselves be void "and null, but the persons so contravening in any of the pre- "mises shall, for him or herself alone, irritate his or her right to "the foresaid lands and others, and the same shall fall to, and "devolve upon, the next heir of entail, though descended of the "contravener's body, in the same manner as if the contraveners "were naturally dead," &c.

Immediately following the parts quoted, there was a provision as to the right of the next heir to make up his titles freed from the acts of the contravener, and a prohibition against the contravener in any way interfering in the management of the lands; and then there was the following clause: — "And providing and "declaring, as it is hereby farther provided and declared, that it "shall not be lawful to, nor in the power of, any of the heirs "succeeding to the said lands and estate, to set any tack or "rental of the same, or any part thereof, for any longer space "than for nineteen years, or for such other or farther space as "is or shall be competent for the said heirs to grant by law for "the time, and without diminution of the rental, at least for the "best rent that can be got for the same without collusion: and it "shall not be lawful to, nor in the power of, any of the said "heirs, to set in tack the manor-place or office-houses, yards, or "orchards thereto belonging, or the parks or enclosures adjacent "to the said manor-place, to any person or persons whomsoever, "for any longer space than the liferent of the granter of the said "tack; declaring hereby, that all tacks made and granted by "any of the said heirs of entail, contrary to the above prohibition, "shall in themselves be null and void."

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On the 19th January, 1814, Sir Alexander Anstruther e cuted a deed of alteration under a power to that effect reser in the deed of 1810, whereby, after disponing to the appell his eldest son, and the heirs of his body, and to his other child *nominatim*, and the heirs of their bodies, and to the other h called by the deed of 1810, he introduced two new sets of s stitutes before the last called by the deed of 1810.

On the death of his father, the appellant, in the year 18 made up his title to the lands, by serving heir of line to father, and heir of tailzie and provision under the two deeds, expeding a charter of confirmation and resignation, upon wh he was infeft in June, 1823.

The appellant possessed the lands upon this title. In 18 he conveyed his interest in the lands to trustees, for securing p ment of his mother's jointure; in 1835, he again, with cons of the trustees in the deed of 1829, conveyed to Renton trustee, in security of a loan of L.10,000, and also of the jointu

In the year 1839, the appellant brought an action against substitute-heirs in the entail, in which he sought to have declared, — "That the prohibitions against wadsetting " feuing the foresaid lands and others, contained in the fores " deed of entail, are not legally or effectually fenced by irrit " and resolutive clauses; and that the pursuer has full " undoubted power to wadset or feu the foresaid lands " others, and to grant all deeds necessary and requisite for t " purpose; and that the said deeds of wadset or feu, wh " granted, shall be legally effectual to the receivers, as fully, " in the same manner, as any deeds of wadset or of feu gran " by an absolute proprietor holding in fee-simple; and that " defenders, and all others substitute-heirs of entail under " said deed, shall have no right to make any claim or dem " against the pursuer, in respect of the said wadsetting or feu " whether to have the pursuer's right in the said lands forfeit

"Or to have him ordained to make payment of any sum "in name of damages or otherwise, or of any other kind or "description whatever;" and also, to have it declared, "that "the prohibition aforesaid, against letting tacks of the foresaid "lands and others for a longer space than nineteen years, or "such other space as may be competent to heirs of entail for the "time, or with diminution of rental, is not legally and sufficiently "fenced by a resolutive clause; and that the pursuer has full "and undoubted power to grant leases or tacks of the said lands "and others, without restriction or limitation as to the endurance "of the same, or the amount of rent therein stipulated, and to "grant all deeds necessary or requisite for this purpose; and "that all leases or tacks of the foresaid lands, for whatever "number of years, or at whatever rent the same may be granted, "shall be valid and effectual to the receivers, as fully, and in the "same manner, as any lease or tack granted by an absolute "proprietor holding in fee-simple; and that the defenders, and "all others substitute-heirs of entail under the said deed of "entail, shall have no right to make any claim or demand "against the pursuer, in respect of his granting the said leases "or tacks, whether to have his right in the said lands forfeited, "or to have him ordered to make payment of a sum of money, "in name of damages or otherwise, or of any other kind or "description whatever."

The defenders pleaded in defence: —

"I. The irritant and resolutive clauses, as well as the pro- "hibitory clause, strike at all wadsets, and feus, and leases, for a "longer space than what an heir of entail may by law grant.

"II. The defenders should be assoilzied, in respect the "three cardinal prohibitions against alienating, contracting, "debt, and altering the order of succession, are fenced by irri- "tant and resolutive clauses; and in respect, that, although they "had not, the prohibitions themselves are effectual, as in a ques- "tion *inter hæredes*."

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The Lord Ordinary (Jeffrey) ordered cases by the parties, and on advising these papers, made *avizandum* with them to the Court, accompanying his interlocutor with a note, in which he expressed his opinion, that the entail was sufficiently fenced.

The Court, on the 26th November, 1840, pronounced the following interlocutor: — "The Lords having advised the case, "and heard the parties, assoilzie the defenders from the conclu- "sions of the libel, and decern; and find the pursuers liable to "them in expenses.

The appeal was taken against this interlocutor.

Mr Solicitor General, Mr Rutherford, Mr M'Conochie, and Mr Forbes for appellant. — If the irritant clause had been confined to the general terms with which it sets out, there can be no doubt that it would have been effectual, and beyond challenge. But it is not so — it goes on to enumerate the acts to be irritated; the efficacy of the clause, therefore, must be limited to the acts specified in the enumeration. In the prohibitory clause, wadsetting and feuing are specially mentioned; but in the irritant clause, they are altogether omitted in the enumeration which is there made; what might have been the effect of the entail, in voiding an act of feuing or wadsetting, if it had been confined to the general term "alienation," which is to be found both in the prohibitory and in the irritant clause, is beside the question. The entailer has not left the matter in that state. He has prohibited alienation; but *besides* alienation, he has prohibited wadsetting and feuing, as if *he*, at least, viewed these acts as not falling within the term "alienation," or as having some specific difference requiring a separate designation, or as being particular instances of alienation. In the irritant clause, he has irritated alienation generally, but he has omitted to irritate those acts which, in the prohibitory clause, he has designated under the

terms wadsetting and feuing, as not embraced by the term "alienation."

In doing this, the entailer has not done that which is without a legal meaning. A wadset, in strict legal language, is not an alienation, it is a mere pledge of the lands, a disposition under reversion, which may never have the effect of carrying away the lands. Neither is feuing alienating — it is merely the constitution of a sub-vassal under the proprietor; and if the feu-duty be the just avail of the lands, the beneficial interest, if not the property, remains pretty much as it was before. Looking, therefore, at wadsetting and sub-feuing as acts not of alienation, they are prohibited, but not irritated.

Viewing wadsetting and sub-feuing, on the other hand, as sufficiently comprehended under the term alienation, in a generic sense, and as being merely *instances* of alienation — still the entail will be ineffectual, as, on the authority of many cases, where a generic term is used in the prohibitory clause, and an enumeration of different species of acts or instances coming within the generic sense follows, it will not do to make use, in the irritant clause, of the generic term alone; but the terms expressive of the particular instances must be repeated.

These grounds of objection apply with still stronger force to the prohibition against granting leases beyond nineteen years. This prohibition is separate and distinct from all the others; it follows the irritant clause, and is, as it were, singled out as a particular object of the entailer's attention. Yet not only is there no irritant clause following, and peculiarly applicable to it, but the act is not enumerated in the general irritant clause, and cannot, in fairness of construction, be held to come within any of the general terms there used. Leases of a great length of duration, and granted under certain circumstances, have, no doubt, been declared to be alienations; but no case has gone the length of fixing, that a lease for any period, however small, beyond nineteen

years, and at a fair and adequate rent, is an alienation. If so, is only leases exceeding the exact period of nineteen years whic are prohibited, and these cannot be embraced by the term alien tion, in the general irritant clause, even if that could be mad applicable to what does not come before, but is found after it.

Neither will the different acts of wadsetting, sub-feuing, o letting leases beyond nineteen years, be affected by the irritanc of "all acts and deeds" done or granted contrary to the prohi bitions; for these terms "acts and deeds" cannot, according t the authorities, embrace all that has gone before; but comprehen only those acts and deeds mentioned separately from the othe acts prohibited, or the enumeration which precedes it.

The authorities relied on, in support of these arguments, wer the cases which have so often been referred to of late with simila views. Bruce *v.* Bruce, *Mor.* 15539; Dick *v.* Drysdale, 16 *F. C.* 460; Barclay *v.* Adam, 1 *Sh.* App. 24; Horne *v.* Rennie, 1 *Sh. and M'L.* 142; Lang *v.* Lang, 1 *M'L. and Rob.* 871; an also Thomson *v.* Miln, 1 *D. B. and M.* 592; and Duffus *v.* Dunbar's Trustees, 4 *M. and D.* 523.

Lord Advocate, Mr Pemberton Leigh, and Mr Anderson, for the respondents, referred to act 1685, cap. 22; Roxburgh, *Mor.* App. *voce* tailzie, as to the efficacy of the words, "all such deeds" in the irritant clause, — To Queensberry *v.* Wemyss, *Mor.* App *vo.* tailzie, p. 53; Cod. lib. 4, tit. 51; *Stair.* II. 11. 13; *Ersk* II. 8. 4; Elliot, *Mor.* 15542, as to the extent and application o the term "alienating,"—To Queensberry *v.* Wemyss, *Mor.* App *vo.* tailzie, p. 44; Malcolm *v.* Brown, 2 Dow. p. 90, and *Mor.* App *vo.* tailzie p. 57; Elliot *v.* Pott, 20 F. C. 611; Hamilton *v.* M'Donald, 18 *F. C.* 302; Queensberry, 1 *Sh.* App. 16, and *Wil. and Sh.* 462; Mordaunt *v.* Innes, 19, F. C. 619; Stirling *v.* Walker, 20 F. C. 279, in regard to the length of leases grant able by heirs of entail, and struck at by the terms "alienate o dispone.'

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LORD CAMPBELL. — I am of opinion that in this case, likewise, the interlocutor appealed from should be affirmed. The appellant first contends, that upon the construction of the deed of entail, he has full power to *wadset* or *feu* the entailed lands, on the ground that the irritant clause is not directed against *wadsetting* or *feuing*. But although *wadsetting* and *feuing* are not specifically enumerated among the acts or deeds which are declared null and void, I think they are included, if the clause be construed according to its grammatical, and natural, and usual meaning. Implication, or probable conjecture, cannot be resorted to for the purpose of supporting an entail; but if the language employed in an irritant clause, according to its grammatical, and natural, and usual meaning, applies to particular acts and deeds, it must by law be applied to those deeds, although they are not specifically enumerated. Here the prohibitory clause, after forbidding any alteration of the succession, forbids the heirs "to sell, alienate, wadset, dispone, or feu "the lands; or to burden them with debts, or any other burden "or servitude; or to contract debts; or to do any other fact or "deed whereby the lands might be adjudged or evicted, in "prejudice of the succeeding heirs of entail." Then comes the irritant clause, declaring, "that all such deeds of contravention, "whether altering the course of succession, selling, alienating, "or burdening the lands; and all acts done by the heirs of "entail, contrary to the above-written conditions and pro-"visions, shall not only themselves be void and null, but the "persons so contravening, in any of the premises, shall irritate "his or her right to the lands, &c."

The appellant admits that the irritant clause may generally refer to the acts and deeds specifically enumerated in the prohibitory clause; but contends that the words in this irritant clause which apply to acts and deeds of contravention, are used specifically, and not generally, and therefore do not comprehend

wadsetting or *feuing*. Now, if the irritant clause be so constructed, that the acts and deeds which it irritates are only particular acts and deeds, and a portion only of those which are described in the prohibitory clause, it cannot be extended to all the acts and deeds described in the prohibitory clause; and the exclusion of any act or deed whereby the succession may be altered, the land may be alienated, or the estate may be burdened by debt, will vitiate the entail. But in this case I am clearly of opinion that the irritant clause does not proceed on the principle of specifically enumerating the prohibited acts to be irritated; that it is as extensive as the prohibitory clause; and that there is nothing to shew that the acts and deeds in contravention of the prohibitions, which are declared null and void, do not comprehend wadsetting and feuing. All acts and deeds alienating or burdening the lands, contrary to the prohibitions, are struck at. By wadsetting, or feuing, the heir would unquestionably grant a deed alienating or burdening the land, and would do an act contrary to the prohibition against wadsetting and feuing. There is nothing to shew that the deeds or acts irritated are to be taken in any restrictive sense, from which wadsetting or feuing should be excluded; and it is quite clear that the clause is framed on the principle of general reference, not of specific enumeration.

Therefore, according to the authorities which I have examined in Lumsden *v.* Lumsden, the last case just disposed of, it appears to me that there was no foundation for this conclusion of the summons.

I think there is equally little for that conclusion, seeking that it may be declared that the pursuer has full power to grant leases, without restriction or limitation as to the endurance of the same, or the amount of rent stipulated.

The foundation for this claim is, that after the general prohibitory, irritant, and resolutive clauses, (which must now be

taken to make a perfect entail, and which would clearly by themselves prevent him from exercising such a power of leasing,) there is afterwards introduced a special prohibition against granting leases for more than nineteen years, and except at the best rent that could be got for the same; with a corresponding irritant, but without a resolutive clause; and it is said that thereby the fetters are struck off as far as leasing for an indefinite term at a nominal rent is concerned.

But I agree that no such effect can be given to the special prohibition against leasing. Even if it merely prohibited specifically what had been before prohibited by the general words against alienating and disponing, fenced with proper irritant and resolutive clauses, I am not prepared to say that it would impair the effect of the general prohibition; but this special clause goes beyond the general prohibition, and the entailer appears to have had a farther object in introducing it, which he has not effectually attained. Although leases for a long term, contrary to the custom of the country, and the beneficial management of the estate, and in fraud of the provisions of the entail, have been held within the purview of a prohibition against alienating and disponing; yet no case has yet decided that a lease for any term above nineteen years, granted by an heir of entail holding under the usual fetters, is necessarily void; and I believe that leases for twenty-one years are by no means uncommon, where the letting is merely with a view to the beneficial management of the estate.

Therefore this prohibition against leases for more than nineteen years, must be considered as of the same nature with that with which it is coupled against letting the manor-place, or any of the inclosures adjacent thereto, for a longer term than the life of the granter, and can in no degree affect the general prohibition against alienating and disponing, which is supported by proper irritant and resolutive clauses, and which is admitted to strike at the unlimited power of leasing now claimed.

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Costs, at dismissing an appeal, not given, because the appeal had been brought with leave of the Court below. Walker *v.* Wedderspoo . . . . . page 57

ARBITRATION.

1. An award under a judicial reference, equally with a decree under an ordinary submission, is challengeable only upon the grounds allowed by the 25th article of the Act of Regulations, viz., corruption, bribery, or falsehood. Mackenzie *v.* Girvan, 43
2. The notes of a judicial referee being referred to in his award, are to be read as part of the award. S. C.

ASSIGNATION.

If the cedent of a debt, assigned in security, sue the debtor in his own name, the Court may order him to find security for costs. Walker *v.* Wedderspoon, ... 57

BILL OF EXCHANGE.

The addition to a bill of erroneous addresses to the names of indorsers, made after the bill has been drawn, will not vitiate the protest upon it, so as to destroy recourse against the indorsers, or preclude the bill from being the foundation of summary diligence. Russell *v.* Creighton, ... 81

BOUNDARY. See *Titles*, 1.

COSTS.

Where the interlocutor of the Inner House, recalling an interlocutor of the Lord Ordinary, was reversed, and that of the Lord Ordinary affirmed, it was with costs to the appellant. Mackersy *v.* Ramsay and Co. 30

See also *Assignation.*

See also *Appeal.*

See also *King.*

JUDICIAL REFERENCE. See *Arbitration*, 1 and 2.

JURY TRIAL. See *Process*, 2.

KING.
If, in a suit for legacy duty, the Crown takes a verdict for than it is entitled, upon an appeal on this and other groun Crown will not be allowed costs. Williamson *v.* Ad General, ... p

LEGACY DUTY.
Terms of a will held to import an express direction to sell so as to subject their value in payment of legacy duty, as o sonal estate. Williamson *v.* Advocate General, .

LEGITIM. See *Personal Succession.*

PARENT. See *Personal Succession.*

PATENT.
User of the subject of an invention, though discontinued for years prior to the date of a patent for the invention, will date the patent. Household Co. *v.* Neilson, . .

PERSONAL SUCCESSION.
Acceptance by a child, after the death of the father, of a prc given by the father in satisfaction of *legitim*, enures t benefit of the father's general disponee, and not of the children. Fisher *v.* Dixon, ...
See also *King.*

PRESCRIPTION. See *Warrandice.*
See also *Tailzie.*

PRINCIPAL and AGENT.
A banker receiving a bill, for transmission to a foreign count order to its acceptance and payment, is liable for the act the agents employed by him for that purpose. Mack Ramsay and Co. . . . . .

PROCESS.
1. Where particular instances of user of the subject of an inv were averred, as "in particular, among others," *held*, that the must be confined to the instances particularly averred. H hill Co. *v.* Neilson.
2. If, on the hearing of Exceptions, the Court is satisfied that was a misdirection, and that the Jury may have been misl it, the Court has no discretion on a view of the verdict, com with the evidence, but must allow the exception. S. C.

PROOF. See *Process*, 1.

REAL OR PERSONAL. See *Legacy Duty*,

SUPERIOR and VASSAL.

If, under a disposition with an alternative manner of holding, the disponee take a base infeftment, a subsequent conveyance of the mid-superiority so created, and a confirmation thereof by the superior, will operate a mid-impediment to the vassal obtaining a charter from the superior, so as to make his holding public. Gardner *v.* Scott, ... page 129

TAILZIE.

1. Where an entail prohibits sales, and irritates all "deeds made or granted" in contravention, it will be effectual, not only against sales, to be completed by deed executed, but also verbal sales, to be followed by *rei interventus*, and enforced by adjudication in implement. Lumsden *v.* Lumsden, . . 104

2. Irritant clause *held* not to be enumerative, but general, and sufficiently comprehensive to embrace all the acts prohibited. S. C.

3. If a word be used in one part of an entail, where it is capable only of one meaning which will support the entail, it must receive that meaning, though it should occur in another part, in another meaning, which, if given effect to as to the first part, would destroy the entail. S. C.

4. Terms of deed *held* not to be a continuance of a previously existing investiture, but to form an original substantive entail. Montgomerie *v.* Eglinton, ... 149

5. *Held*, that possessing for forty years under a deed executed by an heir of an existing and valid tailzie, but in its terms being not a continuance of such existing investiture, but an original and substantive entail, would work off the fetters of the old entail, and *found*, that the heir possessing under such new entail, was entitled to sell the lands, in respect that it had not been recorded. S. C.

6. *Found*, that an heir of entail entitled to sell the lands, by reason of the entail not being recorded, is not bound to reinvest the price under the fetters of the entail. S. C.

7. Terms of resolutive clauses held not to be defective by reason of defective enumeration of the acts to be resolved. S. C.

8. A conveyance of lands was made to A, and the heirs of his body, whom failing, to B, and the heirs of her body, but was never delivered by the granter. A died in the lifetime of the granter, without heirs; B, on the death of the granter, expede a service as heir of provision to A, and executed an entail of the lands. Held, that on the death of the granter, the right to the lands vested in B, and that, whether she were to be viewed as conditional institute, or substitute, under the original conveyance, such personal right entitled her to execute the entail. Fogo *v.* Fogo, ... 195

9. Held, that a party, taking as conditional institute, does not, on

TAILZIE—*continued.*
failure of the *nominatim* institute, require to have his right declared by decree, in order to make his title effective. S. C.
10. Whether a party disponed to *nominatim*, on failure of a prior *nominatim* disponee, becomes, on the failure of the prior disponee, in the life of the granter, conditional institute, or remains a substitute, as at first intended, *Query*. S. C.
11. Terms of irritant clause *held* to be sufficiently general to comprehend all the acts prohibited, and not to be defective as giving an enumeration of particulars, and that a defective enumeration. Anstruther *v.* Anstruther, ... 242
See also *Titles*, 2.

TITLE TO SUE. See *Assignation.*

TITLES.
1. A description of lands held to be demonstrative, not taxative. Gardner *v.* Scott, ... 129
2. A procuratory of resignation, executed by a party uninfeft, having right to a previous unexecuted procuratory made by a party infeft, coupled with obligation to infeft, and an assignation to writs and evidents, rights, titles, and securities, will operate an effectual conveyance of the lands to be resigned under all the conditions; and if the procuratory be made upon conditions, fenced with the usual clauses, it will form an effectual tailzied conveyance. Renton *v.* Anstruther, . 214
See also *Tailzie*, 8.

WARRANDICE.
If lands be conveyed in warrandice of a disposition of other lands, with a double manner of holding, under which the disponee takes a base infeftment, should the mid-superior convey the mid-superiority, and the disponee of the mid-superiority obtain a charter from the superior; this will operate as an eviction of the warrandice, upon which prescription will run against the original disponee of the dominium title. Gardner *v.* Scott, . 129

CASES

DECIDED IN

THE HOUSE OF LORDS,

ON

APPEAL FROM THE COURTS OF SCOTLAND.

7° & 8° Victoriæ,

Session of Parliament 1844.

VOL. III.

REPORTED BY

SYDNEY S. BELL,

OF THE INNER TEMPLE, BARRISTER AT LAW.

By Appointment of the House of Lords.

WILLIAM BLACKWOOD AND SONS, EDINBURGH;
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SIR WILLIAM WEBB FOLLETT.

Appointed April, 1844.

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Appointed October, 1842.

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ADAM ANDERSON, ESQ.

Appointed October, 1842.

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CAUTIONER.

Facts, regarding the conduct or circumstances of an agent, occurring prior to the granting of a Bond of Caution for him, which were known to, or might have been ascertained by, the creditor, but which were not disclosed to the surety, will vitiate the bond as to the surety, without regard to the motive from which the non-communication may have arisen. Railton *v.* Matthews page 56

COMPENSATION AND RETENTION.

The balance upon an open running account, between an heir in possession under an entail and third parties, appearing as on the day upon which the entail was put upon record; *held*, to extinguish a separate and distinct debt, to the effect of barring the third parties from affecting the entailed lands for an ulterior balance subsequent to the recording of the entail, and this although the balance on the particular day was composed of money received on behalf of the Crown. Drummond *v.* Ross 87

CORPORATION.

1. A corporation having in its charter certain purposes specified as the objects of the application of its funds, is not limited in such application to the purposes specified, but may extend it to other purposes *ejusdem generis* with those specified or within the scope of its constitution. Ellis *v.* Henderson 1
2. A member of a corporation knowing, and for several years not complaining, of acts of the corporation is barred *personali exceptione*, from afterwards quarrelling these acts as *ultra vires*—*Semble*. S. C.

CROWN DEBT. See *Compensation and Retention.*

LOCALITY.

A judgment in one process of locality upon a point in issue between the parties will form *res judicata* in a subsequent locality. Blantyre *v.* Wemyss 34

MORTIS CAUSA DEED. See *Tailzie*, 11.

NON-ENTRY.

Found that a superior having granted a charter under the procuratory in a strict entail, and received a year's rent on the entry of the first party taking under the investiture, is not entitled to a similar payment on the entry of subsequent heirs of entail not

NON-ENTRY—*Continued.*

heirs of line of the party last entered, on the ground that they are singular successors; but that he can claim only the relief duty payable on the entry of an heir, and this notwithstanding the superior, at granting the first charter under the entail, may have inserted in it a clause declaring that the granting of the charter should not exclude his claim to a year's rent, whenever the heir asking an entry should not be the heir of line of the person last entered. Stirling *v.* Ewart . . . . page 128

PERSONAL EXCEPTION. See *Corporation*, 2.

PRINCIPAL AND SURETY. See *Cautioner*.

PUBLIC OFFICER.

1. A public officer holding his appointment for life, with power to appoint a subordinate officer, may validly make the appointment of such subordinate officer for life, though the appointment may thereby extend beyond his own life. Earl of Rosslyn *v.* Aytoun 70
2. It is not competent for a public officer having power to appoint a subordinate officer for life, to make such appointment to two or more persons for their joint lives, with benefit of survivorship, there not being any usage to support such an appointment. S. C.

RES JUDICATA.

A judgment upon a question raised, but not material or necessary for the decision of the issue between the parties, will not form *res judicata*. Blantyre *v.* Wemyss 34

See also *Locality*.

SALMON FISHING.

Held that the prohibitions of the statutes in regard to the use of stake-nets, is not limited to the space between where the sea reaches at highest flood, and where it reaches at lowest ebb, as an inflexible rule; but that the space to which the statutes apply is in each case to be ascertained by evidence of the character of the waters as contrasted with the terms used in the statutes. Ross *v.* Duke of Sutherland 315

SUPERIOR and VASSAL. See *Non-Entry*.

TAILZIE.

1. Where an open account is subsisting between parties, and an heir of entail in possession under an entail, which is not put upon record until at an advanced period of the account, the right of these parties to attach the entailed lands for payment of the balance upon the account is limited to the amount of the balance upon the day on which the entail was put upon record. Drummond *v.* Ross 87
2. Where selling, alienating, and disponing are prohibited, the irritant and resolutive clauses, though using the terms "alienating" and "disponing," but dropping that of *selling*, will be effectual to prevent sales. Murray *v.* Murray 100

TAILZIE—*Continued.*

3. The meaning of the word "deeds," where used referentially, is to be construed by the words to which it refers, and construed in this manner was *held* to mean sales. S. C.

4. A general prohibition to do a certain act, is not limited by a subsequent description of one of the consequences of the act, but will include all the consequences. S. C.

5. A prohibition against "burdening or affecting" lands "in whole or "in part, with debts or sums of money, infeftments of annual-rent, "or any other servitude or burden whatsoever," held to be a sufficient prohibition against the contracting of debt, to satisfy the Act 1685. Lindsay *v.* Earl of Aboyne . . . page 254

6. An irritant clause in its outset, embracing the acts done by the institute of entail, as well as by the heirs, is not limited in its operation to irritating the acts of the heirs only, by these words, "and "be ineffectual and unavailable against the other heirs called to "succeed," and by a subsequent declaration, that "the heirs, as "well as the said lands and estate, shall no wise be burdened there-"with, but free therefrom, in the same manner as if such debts or "deeds had never been contracted or granted, or such acts or "omissions had never been done or happened." S. C.

7. A deed of entail only referring to a previous deed for its fetters, *held* to be ineffectual. S. C.

8. Terms of irritant and resolutive clauses held sufficiently expressed to embrace all the prohibitions in the prohibitory clause. Adam *v.* Farquharson. 295

9. A prohibition "to burden the said lands in whole or in part with debts contracted," &c., held to import a prohibition to contract debt, satisfying the words of the statute. S. C.

10. A deed of entail which contained prohibitions embracing acts by the institute by name, and a general irritancy of all acts contracted, granted, or done in contravention of the prohibitions, without mention of the institute or heirs, followed by a declaration that all debts, deeds, and acts contracted or done in contravention, should be ineffectual against "the other heirs of tailzie," was *held* effectual to void a deed altering the order of succession made by the institute. Carrick *v.* Buchanan 342

11. Held that a gratuitous *mortis causa* deed, altering the order of succession prescribed by an entail, is void in a question *inter hæredes*, without regard to the question whether the entail was sufficiently fenced under the Act 1685. S. C.

See also *Non-Entry.*

TRINDS. See *Locality.*

CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND.

1844.

[15*th March*, 1844.]

WILLIAM ELLIS, and Others, *Appellants.*

ROBERT HENDERSON, and Others, *Respondents.*

Corporation.—A corporation having in its charter certain purposes specified as the objects of the application of its funds, is not limited in such application to the purposes specified, but may extend it to other purposes *ejusdem generis* with those specified or within the scope of its constitution.

Personal Exception—Corporation.—A member of a corporation knowing, and for several years not complaining, of acts of the corporation, is barred *personali exceptione*, from afterwards quarrelling with these acts as *ultra vires—Semble.*

IN the year 1784, certain parties who had been admitted, and were entitled to practise as Solicitors before the Supreme Courts of Scotland, formed themselves into a Society, under a Contract or Articles of Association. The 25th and 27th Articles of this Contract were expressed in these terms:—25th. "The whole "sums of money which shall be paid to, or come into the hands "of the treasurers of this Society, and all subjects, securities, "and effects, which shall fall under the care, management, or

ELLIS *v.* HENDERSON.—15th March, 1844.

" administration of the treasurers, or of the commissioners of " accompts, or any of them, by virtue or in consequence hereof, or " of any other regulation, order, or resolutions of this Society, are " and shall be the absolute property, and at the disposal of the " members thereof; and the treasurers, commissioners of ac- " compts, and every other person whom it shall or may concern, " shall accordingly strictly obey and conform themselves to all " resolutions and directions of this Society, in relation to the pre- " mises, as shall to them respectively appertain."

27th. " At each general stated meeting on the first Monday " of August annually, the whole unfunded monies of the Society, " and the unexhausted interest thereof, shall be accumulated and " formed into a capital or principal sum, which, after deduction " of such sum or sums as shall then be deposited and left in the " hands of the treasurer, as above said, together with such other " sum or sums of the said interest as shall appear needful to be " otherwise disposed of, shall be converted into a capital, and " ordered to be funded, or laid out on interest, or for annual " profit, at the sight of the treasurer and commissioners of " accompts, as shall be then directed by the Society, or a majority " of the qualified members then present; and the security or " securities for the sum or sums so accumulated, shall be taken " and conceived, *quoad* the said capital or principal, in favour of " the presidents, treasurer, and commissioners of accompts for " the time then being, *nominatim*, or to any three of them, (who " shall be a quorum, the treasurer, while in office, being one, *et* " *sine quo non*,) and to their assignees, as trustees for behoof of " the whole members of this Society, and the interest or annual " profits accruing from the said principal sums, shall always be " payable to the treasurer for the time, as sole trustee, for behoof " of the whole members of this Society; to whom he, and the " other trustees aforesaid, shall be answerable at all times *pro* " *rata*, for his or their management, acts and deeds, in relation to " the premises."

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The 30th Article was in these terms, "Three-fifths of the "interest, rents, and annual profits, due for the time, accruing "from the whole principal sums, and other subjects belonging "to this Society, after deduction of the salaries and necessary "expenses then due, shall be at the disposal of a majority of "the qualified members, in general meetings duly assembled, "for the relief of indigent members, widows, and children, and "for such other purposes as shall appear proper, until the funds "of the Society shall be deemed sufficient to yield such stated "or fixed annuities as shall be hereafter provided for by this "Society; but it shall not be lawful to fewer than two-thirds in "number of the qualified members in general meetings duly "convened, to order to be paid away or disposed of any more or "greater sum of the said interest, on any account whatever."

In the year 1797 the Society obtained a Charter from the Crown, which, among other things, recited "quod quoque sum-"mam pecuniæ collegerunt tanquam principium pecuniæ depo-"sitæ pro bibliotheca librorum utilium et necessariorum com-"paranda, proque subsidio sociorum defectorum, et viduarum 'liberorumque sociorum in rebus egenis morientium: Et quan-'doquidem pro his propositis consequendis, et pro dictæ socie-'tatis meliori tutamine atque administratione in pecuniarum 'depositarum aliarumque rerum cum securitate, promovere et 'negotia reipublicæ, in quantum ad eorum praxeos occupatio-'nemque in dictis curiis refert, in modo proprio et regulari 'perficere possint, petitores humillime supplicaverunt, ut nobis 'gratiose placeret regiam cartam nostram concedere petititores."

The granting part of the Charter was at one place expressed in these terms: "Et quod illi eorumve successores in omni tem-'pore futuro, durationem perpetuam et successionem habebunt, 'ut melius magisque efficaciter administrare, dirigere, ordinare 'et constituere possint, omnia res et negotia ad dictam socie-'tatem spectantia, pecuniasque depositas ad eandem pertinentes; 'Cum protestate ad illos aut partem majorem illorum adminis-

ELLIS *v.* HENDERSON.—15th March, 1844.

" trandi, dirigendi, ordinandi et constituendi, in omnibus rebus " et negotiis, ad dictam societatem ejusque gubernationem et " administrationem ejus facultatem pecuniarumque, depositarum " spectan. et pertinen. Et quod dictæ societati per nomen titu- " lumque antedictum licitum et ligitimum erit, habere, acqui- " rere, recipere, tenere, possidere, frui, et in perpetuitatem, aut " aliter retinere, terras, tenementa, et hereditamenta cujuscunque " generis, qualitatis, aut naturæ."

And in a subsequent part of the charter the following passage occurred: " Et nos, pro nobis hæredibus et successoribus nostris, " damus et concedimus petitoribus illisque personis quæ nunc " componunt, vel postea dictam societatem component, plenam " potestatem et auctoritatem ad eorum generales conventos " ordinatos de tempore in tempus congregatos constituendi, ordi- nandi, et faciendi tales et tot leges privatas, constitutiones con- suetudines et edicta, quæ illi vel major pars illorum pro tem- " pore congregatorum, pro meliore administratione et ordine " rerum et pecuniarum depositarum dictæ societatis attentio- " numque patrimonialium gubernatione propria et necessaria " judicabunt, dictasque leges privatas, constitutiones, consuetu- " dines et edicta, ullasve earum, mutandi aut abrogandi, ut " dictæ societati vel majori parti illorum tunc præsentium " necessarium esse videbitur; omnes quas leges privatas, consti- " tutiones, consuetudines et edicta uti prædicitur faciend. debite " observanda et tenenda volumus: Providen. semper, quod " eadem legibus regni non adversa vel contraria erunt, talibusque " legibus privatis et ordinationibus ad Judicium Curiæ Sessionis " recognitionem summatim ad applicationem ullius personæ " interesse haben. semper subjectis. Et ulterius, nos, ex gratia " nostra speciali, certa scientia, et proprio motu, dedimus et " confirmavimus, tenoreque presentium, pro nobis hæredibus et " successoribus nostris, damus et confirmamus, dictæ societati, " omnia bona, summas pecuniæ, jura, fœnora, proficua, beneficia, " securitates, commoda, protestates, privilegia, aliaque negotia e

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"res quæcunque, per dictam societatem, vel per ullos ejusdem "socios, pro usu et commodo ejusdem, hactenus habita, recepta, "fruita, exercita, intitulata, facta vel acta: Tenenda et habenda "recipienda, percipienda, exequenda, et fruenda, omnia et singula "dict. præmissa ultimo supra mentionata, per illos eorumque "successores dictamquæ societatem in perpetuum, et in modo "tam amplo et benefico ad omnes intentus et proposita, quam "dicta societas ullusve ejusdem socius, pro usu et beneficio "ejusdem antehac, eadem tenuerent, fruiti fuerunt et exer-"cuerunt."

At a General Meeting of the Incorporated Society, held on the 14th of January, 1817, it was unanimously resolved "that "the establishment of a Scheme for providing Annuities to the "Widows of Members of this Society is a proper and expedient "measure;" and a Committee was appointed to report as to the measures advisable for carrying such a scheme into effect.

The Committee appointed by this Meeting reported to the Society the following resolutions:—

"1*mo*, That the annuity to the widows of the members of "the Society, contributors to the Widows' Scheme, ought to be "fixed at 30*l*. per annum, commencing at the first term of "Whitsunday after her husband's death, and to continue during "her life, and while she remains a widow only; the annuity "becoming forfeited on her entering into a second marriage.

"2*do*, That for effectuating this purpose, 1000*l*. of the funds "of the Society should be appropriated to the Widows' Scheme "at the term of Whitsunday next; that one-half of the annual "guinea payable by the members of the Society, should go to "the fund; and two-thirds of the sum payable by future intrants "with the Society.

"3*tio*, That the Scheme should commence at Whitsunday "next, when each contributor should pay 5*l*. 5*s*., whether he "be a married man, a bachelor, or a widower, and become bound "to pay the like sum of 5*l*. 5*s*. during his life, at the term of "Whitsunday yearly.

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" 4*to*, That every present member of the Society becoming a " contributor to the Scheme, if married, and if his age exceed " his wife's above five years, should pay at the term of Whitsun- " day next of marriage tax as follows; viz. if he is above forty " and not above fifty years of age, the sum of 5*l.*; and if between " fifty and sixty, 10*l.*; and if above sixty years old, the sum of " 15*l.*; and that he also should pay at said term 3*l.*, if his own " age exceed that of his wife above five years, and does not " exceed it six years; 6*l.* if more than six and not exceeding " seven years; and if more than seven and not exceeding eight " years, the sum of 9*l.*, and so on progressively, at the rate of " 3*l.* for every other year his age exceeds that of his wife.

" 5*to*, That every member of the Society may become a con- " tributor to the Scheme, by declaring his resolution to that " effect by a letter to the Society's treasurer, betwixt and the 1st " day of May next, in which letter he must declare whether his " own age exceeds that of his wife more than five years, and if " so, he must also state his own age, and the difference between " it and that of his wife, so as his marriage-tax, on the principle " above-mentioned, may be ascertained by the treasurer.

" 6*to*, That those members who so declare themselves between " and the 1st day of May next, shall constitute '*the Society of* " '*the Contributors to the Widows' Scheme of the Solicitors of the* " '*Supreme Courts of Scotland*;' and such of the present mem- " bers of the Society as may thereafter declare their accession to " the Scheme before Whitsunday, 1819, shall be received as " contributors on a petition to the Society of Contributors, but " on such terms as a majority of the Society shall agree to " receive them.

" 7*mo*, That on a contributor entering into a second mar- " riage, he shall at the next term of Whitsunday thereafter, pay " the above-mentioned marriage-tax, in respect of his own and " his second wife's age at the time of his second wife's marriage; " and every unmarried contributor shall on a first and second " marriage pay the like marriage-tax.

ELLIS *v.* HENDERSON.—15th March, 1844.

"8*vo*, That every future member of the Society shall be "entitled to become a member of the Society of Contributors to "the Widows' Scheme upon the following terms: 1*st*, Upon "paying the annual contribution of 5*l.* 5*s.* from the term of "Whitsunday immediately previous to his declaring his acces- "sion to the Scheme, and becoming bound to pay the same sum "at the term of Whitsunday thereafter, yearly during his life "2*nd*, If he is married at the time of his accession, and he is "more than five years older than his wife, he should pay the "marriage-tax corresponding to the difference of their ages "according to the scale before mentioned: And further, if he is "above forty, and not above fifty years of age, he should pay "15*l.*, and if above fifty years of age, 30*l.*, and that at the first "term of Whitsunday after his accession. And if he is not "married at the time of his accession, but afterwards marries, "besides the foresaid annual contributions from the time of his "accession, he should pay the marriage-tax corresponding to the "excess of his own age above that of his wife, as before-men- "tioned: And further, if above forty and under fifty at the time "of his accession, he should pay 15*l.*; and if above fifty years "of age, 30*l.*, and that at the first term of Whitsunday after his "marriage.

"9*no*, That if any contributor shall die before he has paid "six years' rates or annual contributions, such deduction should "be made from his widow's annuity as shall, with the annual "rates paid by him, amount to six years' contributions; but "there shall be no deduction from the first year's annuity, (unless "the case of widows whose husbands shall die before Whit- "sunday 1818, in which case the deduction shall commence at "Whitsunday 1819). But the deduction shall only be made "from the widow's annuity at the rate of 5*l.* a-year, until the "said six years' annual contributions, with interest thereof, are "fully paid up.

"10*mo*, That the funds should be vested in the persons of

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" five trustees, viz.: the preses and vice-preses of the Society of " Solicitors, if they are contributors, and three other contributors, " to be chosen by a majority of contributors at a meeting to be " held for that purpose. And at said meeting, the contributors " should also elect a treasurer, who shall find ample security for " his intromissions, whose salary shall be 5*s.* per annum for each " contributor to the fund, at the term of Whitsunday yearly."

At a General Meeting of the Society held on the 17th March, 1817, the resolutions of the Committee were unanimously approved of, with the exception of the second, which was reserved for consideration by a future Meeting.

A General Meeting held on the 13th May approved of a contract by the contributors to the Scheme, and in substitution for the second article of the resolutions, resolved that—

" There should be appropriated from the funds of the Society " of Solicitors to the funds of the proposed Widows' Scheme the " sum of 750*l.* sterling, with interest from the term of Whit- " sunday 1817 until paid, to the collectors of the Widows' Fund, " reserving power to the Society at any future period to vote a " farther sum in aid of the Widows' Scheme, in case the funds " of the Society will admit of it; and that there should be " appropriated to the Widows' Scheme one-half of the annual " sum of 1*l.* 1*s.*, payable by the members of the Society, which " should be payable to the said collector each year upon the " day of ; and lastly, that there should " be appropriated to the Widows' Scheme one-half of the entry- " money payable by every future member of the Society of " Solicitors."

Towards the end of the year 1817, a contract was prepared and executed by such members of the Incorporated Society of Solicitors, as resolved on becoming contributors to the Widows' Scheme. The first article of this contract was in these terms:—

" The subscribers to these presents, and such other mem-

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" bers of the Society of Solicitors as may afterwards become " contributors to the Widows' Scheme, shall constitute a Society, " to be called and known by and under the name of 'THE SOCIETY " 'OF CONTRIBUTORS TO THE WIDOWS' SCHEME OF THE SOLICITORS " 'OF THE SUPREME COURTS OF SCOTLAND.'"

The second article set out in these terms: "The subscribers " hereto, members of the said Society and Corporation of Solici- " tors in the Supreme Courts of Scotland, at the term of Whit- " sunday, 1817, or who shall become members of the said Society " before the term of Martinmas, 1817, and who, by their sub- " scriptions hereto previous to the said term of Martinmas, 1817, " shall become contributors to the Scheme for raising a fund for " a provision to the widows of the members," and bound the subscribers to make an annual contribution of *5l. 5s.*

The third article allowed any member of the Society of Solicitors, who should not before Martinmas, 1817, have declared his intention to become a contributor to the Widows' Scheme, to do so after that time, upon executing a separate bond under this proviso: " But it is expressly provided and declared, that the persons " who shall be members of the said Society of Solicitors at the " term of Martinmas, 1817, and who shall not have acceded to " the Scheme before the term of Whitsunday, 1819, shall be " excluded from the benefit thereof for ever, unless they shall be " admitted by two-thirds of the contributors to the Scheme " present at a general meeting, held in time of Session, upon " their application, and making payment of 10*l.* sterling, over and " above the rates and whole other contributions that would have " been due by them, if they had become contributors under this " contract previous to the term of Martinmas, 1817, with interest " thereon till paid."

The fourth article declared, that "Every person admitted a " member of the said Society or Corporation of Solicitors, after " the said term of Martinmas, 1817, shall be entitled to become " a member of the Society of Contributors upon his declaring

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" his accession" to the scheme within twelve months after th date of his admission, upon executing a bond to that effect.

The fifth article declared, that persons admitted members c the Society of Solicitors after Martinmas, 1817, who should nc have become members of the Society of Contributors withi twelve months after such admission, should " be excluded fror " the benefit of the Widows' Scheme for ever," under the sam proviso as in the third article.

The eighth article which regulated the contribution b future members, contained the following proviso:—" As als " providing and declaring, that every future member of th " said Society of Solicitors, admitted after Martinmas, 1817 " claiming to be entitled to be a contributor to this Scheme " shall, previous to admission, produce a certificate signed b " a member of the College of Physicians or Surgeons in Edin " burgh, or otherways satisfy a majority of the Society of Con " tributors that he does not, at the time of his application for ad " mission, labour under any disease particularly tending to shorte " the duration of life. And also providing and declaring, tha " after the term of Martinmas, 1817, no member of the Society c " Solicitors shall be admitted to the benefit of this Scheme, wh " is above the age of forty-five years, unless upon a petition to th " Society of Contributors, which is to be considered at a meetin " specially called for that purpose; when, if it shall be th " opinion of two-thirds of the members there assembled, that th " petitioner should, notwithstanding his age, be received as " contributor, he shall be received as such; but not otherwise."

Shortly after this contract was executed, viz., in Decembe 1817, the entrance money to the Society of Solicitors, and th payment to the library, which had previously been 21*l.* an 2*l.* 2*s.*, were increased to 50*l.* and 5*l.* 5*s.* respectively.

In June, 1823, Robert Henderson, the respondent, w admitted a member of the Society of Solicitors, and paid 55*l.* 5 on his admission. He was at the same time asked if he desir

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to become a member of the Society of Contributors to the Widows' Fund, when he answered in the negative. After his admission, he paid 1*l.* 11*s.* 6*d.* annually, being 1*l.* 1*s.* to the general fund of the Society of Solicitors, and 10*s.* 6*d.* to the library. These payments he continued until the year 1834. One half of his contribution during that period, as well as that of the other members, was annually appropriated to the Widows' Fund, in conformity with the resolution of 1817, as appeared from the accounts of the Treasurer of the Society of Solicitors, which were annually exhibited on the table of the Society for the space of a month.

In the year 1834 Henderson ceased to pay further contributions to the Society's funds, for what reasons did not appear.

In the year 1839, Henderson moved a resolution, that in respect the resolution of 1817, appropriating to the Widows' Fund, one-half of the entrance money and annual contributions, was *ultra vires*, it should be rescinded and declared void, reserving to the Society or the members to insist for repetition of the money. This resolution was not carried, but another was carried rescinding the resolution of 1817, as to its future operation.

In the year 1840, at which period the Society of Solicitors consisted of 115 members, of whom forty-two were contributors to the Widows' Fund, Henderson presented a note of suspension against the Society of Solicitors, and its office-bearers, praying the Court of Session to prohibit the respondents from paying over to the Widows' Fund the half of the entrance money and annual contributions to the Society of Solicitors, "reserving to "the Complainer all right and title to insist and sue for repetition "for behoof of the Incorporated Society as a body, of the sums "exacted from him and all other members, and illegally appro- "priated to the said private Widows' Fund."

Henderson at the same time brought an action of Reduction and Declarator against the Society of Solicitors, and against the contributors to the Widows' Fund, in which he sought

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to have it declared, that it was *ultra vires* of the Society to pa the resolution of 2nd June, 1817, or to make such appropriatio of the Society's funds as was thereby effected, and to have th resolution, "with all that has followed or may follow thereupon reduced and declared void and null.

At the time at which the action was raised, there were eleve widows deriving benefit from the Widows' Fund, seven of whoı compeared to the action.

A record was made up by condescendence and answers, i which the pleas in law for the pursuer and suspender were,—

"I. The resolutions and proceedings under reduction ar "illegal and *ultra vires*, in respect that the intention and effec "of them is to appropriate certain funds belonging to the Incoı "porated Society of Solicitors to purposes not contemplate "in the charter of incorporation, and in which the Incorporatio "as such has no interest.

"II. The resolutions and proceedings under reduction bein "in themselves null and void, and the resolution of date 2n "December, 1839, rescinding and making void the resolutior "and proceedings under reduction, being a valid and bindin "resolution of the Incorporated Society, the pursuers are entitle "to decree of declarator and reduction, in terms of the concl "sions of their summons.

"III. The pursuer and suspender, Mr. Henderson, as "member of the Incorporated Society, has good title and inte "est to apply for, and obtain the interdict craved, to preve "the misapplication of the common funds of the Incorporation.

"IV. The Association or Society of Contributors to th "Widows' Scheme, defenders, having in law no connectic "with or claim upon the Incorporated Society, are not entitle "to demand or receive any aid or support from the Incorpor "tion's funds.

"V. The pursuers have done no act, either jointly or sev "rally, by which the right of any of them, as members of th

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" Incorporation, to challenge the illegal proceedings under " reduction can be held to have been waived, abandoned or " lost."

On the other hand the pleas in law for the defenders were these:—

" I. The pursuers are now barred, *personali exceptione*, from " challenging the resolutions complained of on any of the grounds " urged in the present suspension and reduction.

" II. The resolution of June, 1817, is now binding and " effectual, as a stipulation or regulation of the Society upon " the principle of usage, as explaining or even altering the terms " of the original contract of the Society.

" III. The resolutions complained of are now valid and " effectual *quoad* the defenders and compearers, and cannot be " questioned by any member of the Incorporation, in respect " these resolutions form matter of contract between the Incor- " poration and the Widows' Scheme, implemented and relied " upon by both parties, and in respect the continuance of imple- " ment is requisite for the stability and existence of the Widows' " Scheme, which was substantially instituted by the Incorpo- " ration."

The cause was then argued upon cases which the Lord Ordinary (*Cunninghame*) reported to the Court, accompanying his interlocutor with an elaborate note, favourable to the views of the appellants, which will be found in 4 B. M. and D. 370, N. S.

The Inner House required of the pursuer to know whether he intended to avail himself of the right to repetition reserved in the prayer of his suspension. The pursuer in consequence put in a minute, stating, that in making that reservation, he did not mean to reserve any right to demand repetition from widows of deceased members of the Society of Solicitors, of sums actually received by them previous to the date of the judgment of the Court, as payment of annuities from the Widows' Scheme, but

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he reserved all action and claim for repetition as again other defenders, respondents, and compearers.

The Court then, on the 13th January, 1842, prono the following interlocutor, "Reduce, decern, and decl "terms of the conclusions of the libel, and suspend the pr "ings complained of, and grant interdict as craved, res "to the pursuers and suspenders under the qualification sp "in the said minute, all right competent to them to ins "further redress in the premises, and to the defenders, "defences as accords."

The appeal was taken against this interlocutor by the S of Contributors to the Widows' Scheme, and by the wi compearers.

Mr. Kelly and Mr. Anderson, for Appellants.—I. The r tions under which the Widows' Scheme was framed, an appropriation of funds for its creation must be presumed to been perused and acceded to by all members who entered the date of the resolutions. Prigge *v.* Adams, *Skin.*, 350; bridge *v.* Herring, *Lutw.*, 404; Taverner's Case, *Raym.*, Moreover, the evidence in the admitted fact of the respond the time of his admission to the Society of Solicitors having asked whether he would become a member of the Soci Contributors to the Widows' Scheme, and in the fact o yearly appropriation of funds to the Widows' Scheme app in the annual accounts of the treasurer to the Society of S tors, which, together with the minutes of both societies, open to the perusal of all the members, is strong to shov the respondent was actually cognisant at the time of his a sion to the Society of Solicitors, and from time to time th forth, of the appropriation of funds for the Widows' Schem

[*Lord Campbell.*—It may be argued that Henderson is i same situation as if he had been present when the resolutio passed, and had concurred in it.]

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Undoubtedly, for he saw the orders passing on the funds of the corporation, and the application of the half of his own yearly contribution. Persons relying on these resolutions, might come a day after day into the Corporation of Solicitors, for the purpose of gaining to their widows the benefit of the Widows' Fund, which Henderson, by his acquiescence, had led them to rely upon as available. Henderson therefore is barred by personal exception from challenging the resolution. The authorities for this are to be found both in England and Scotland. In the King *v.* Stacey, 1 *T. Rep.* 1.

[*Lord Campbell.*—No doubt, that by law of England, personal exception would prevail. You need not cite authorities for that.]

Then, in the Magistrates of Montrose *v.* Mill, 1 *W.* and *S.* 570, the Court of Session refused to sustain a plea of personal exception; but this House reversed the decision, and sustained the plea. The same plea was recognised by the Lord Chancellor in giving judgment in Fleshers of Glasgow *v.* Scotland, 3 *W.* and *S.* 209. And in Beveridge *v.* Smith, *Mcl.* and *Rob.*, 806, this plea also received effect.

[*Lord Brougham.*—In the revised opinions of the Judges, no notice is taken of this point.]

It seems to have been very lightly dealt with.

II. One of the express objects of the original contract, and of the charter incorporating the Society of Solicitors, was to make a provision for the widows and children of members; it could not therefore, be inconsistent with the objects of the Incorporation to lay aside part of its surplus funds for a similar provision; neither could it be opposed to the general principles or policy of the law in Scotland, for it is a general object of all the Trades' Incorporations in Scotland, and of similar incorporations, to form such provisions. The Courts no doubt have power to regulate the bye-laws of incorporations, but their interference must not be arbitrary and capricious, it must be founded on something relevant

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and substantial. Whether the annuities are too great in amount or whether they ought to be fixed or variable, are questions within the powers incident to all corporations and specially conferred upon this. They are mere questions of bye-law, with which the Courts had no right to interfere, so long as the subject of them was not contrary to the professed and real objects of the Incorporation, or to the law and policy of the country, neither of which was the case in the present instance.

III. But it is said, that however it might have been competent to establish a fund of provision for widows, to be distributed at discretion, according to the necessities of each case, it was not competent to establish such a fund in a manner which withdrew it from the control of the Corporation and gave those for whom it was provided a right to insist on its application. There is no authority, however, for such doctrine. The contrary was established in Fleshers of Glasgow *v.* Scotland, 3 *W.* and *S.* 209, where the resolutions of the Incorporation were held to be matter of agreement between it and its members, which the latter had a right to enforce; and even if the application of the fund had been left discretionary, it is all but doubtful whether its application could not have been enforced as a matter of right. Paterson *v.* Skinners of Edinburgh, *Mor.* App. Aliment, No. 6.

IV. It is further said that the contract and charter warranted only a provision for indigent widows and children; the word "indigent" being supplied before each object in the sentence. The contract does not grammatically require such a construction, and the charter specifies only the widows of indigent members. If the circumstances of the party were to regulate, how could a scheme have been framed which could have worked without in each instance the most inquisitorial and offensive inquiries? The member might die indigent, and his widow nevertheless be opulent; or the member might die opulent, and the widow nevertheless be indigent. Again, it is objected that the scheme does not provide for indigent *members*. This may be a

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very good reason why the scheme should have been enlarged and extended, but forms no objection against it, so far as it goes.

If this judgment be sustained, the pursuer is left to adopt his ultimate remedy, which will be an account on the principles fixed by the judgment, and than that nothing more alarming or unjust in its consequences can be conceived.

[*Lord Cottenham.*—If I understand the reservation, the respondents, though they abjure any repetition from widows of the sums received by them, they reserve their whole claim against the defenders.]

Exactly. So that they in truth gave up nothing by the minute.

Mr. Attorney-General and Mr. Moir, for Respondents.—The object for which the charter was given to the Society of Solicitors was to bestow permanence and respectability on a body of learned practitioners; to give them a power of action; and enable them to provide a library for their common use and improvement. These are the objects stated in the charter, and it was not competent for the parties to pervert the grant of the Crown to a totally different purpose, the creation of an insurance company for the benefit of the wealthier members, and to levy contributions from the general members for that purpose.

By the contract upon which the charter was founded three-fifths of the free funds of the Society of Solicitors were to be at the disposal of general meetings, "for the relief of indigent "members, widows, and children." Which words, by proper grammatical construction, are to be read as if "indigent" were before "widows" and before "children." This is shown by the recitals of the charter where the words are "proque subsidio "sociorum defectorum et viduarum liberorumque sociorum in "in rebus egenis morientium." The funds under these words then were to be applied for the relief of the widows and children of members generally, who had died in needy circumstances, but

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the fund created under the scheme is not for this purpose. Th mere fact of being a member of the Society of Solicitors does nc entitle the widow of the party to relief, and his circumstance form no part of the consideration determining whether his widow shall have relief. The sole ground of right is the fact of pay ments made, so that in truth the fund is for the benefit of th wealthy instead of the needy.

Having obtained a charter for certain purposes, the partie apply the grant of the Crown to a totally different one, th creation of a society distinct from the Society of Solicitors, whicl has no one of the objects of the charter to the Solicitors in view the members of which, in order to become members of the on must be members of the other, but being members of the on are not necessarily members of the other, although the funds c the one are appropriated to and dealt with by the other. As t members of the Society of Solicitors, prior to the scheme, the were to be excluded by the 6th article, unless they gave thei adhesion by a particular day. And as to future members, th entrance money, on the payment of which their admission to th Society of Solicitors depended, was increased, in order to provid this fund of relief; and the half of their annual contributions w applied to the same purpose, without either of these circum stances entitling the party to any benefit from the fund create The Society of Contributors is in truth no other than an Insu rance Society, formed for the benefit of the members of t Society of Solicitors, who were able to contribute to its fun and having appropriated to it part of the funds of the Society Solicitors, and of the contributions of its members, but this w quite beside the objects for which the charter was given to th Society of Solicitors. The charter was intended for charity, b charity is not discoverable in the objects of the scheme, whi in fact confers a bounty out of the funds of the Society up those who are able to insure their life, to the exclusion of tho who are unable, but who nevertheless are obliged to go on co tributing annually to the scheme.

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[*Lord Brougham.*—Article 3 operates no exclusion of members, it merely operates to prevent fraud by hindering parties lying by till ill of a mortal disease and then joining.]

Whether it operates as an exclusion or not depends on the circumstances of the party. Having obtained the grant of the Crown the parties apply so much of the existing funds of the corporation to the creation of another.

LORD BROUGHAM.—My Lords, in this case we did not think it necessary to call upon the learned counsel for the appellants to reply. I have no doubt whatever in my own mind that this case has been wrongly decided; that there has been a great miscarriage in the Court below in dealing with this important question. I can see no reason to doubt upon either of the points, but it is unnecessary to dispose of the second point, the question of the *personalis exceptio*, in order to overturn this judgment, though it would be necessary to dispose of that question with the respondent, in order to affirm and support that judgment.

The first question which arises, and the most important question beyond all doubt, is the legality of the proceeding taken by the Society of Solicitors. Now the ground upon which this proceeding of theirs is sought to be set aside by a declaration which is the foundation of the whole proceedings,—a declaration that the scheme for providing a fund for the widows and members of the Solicitors' body was illegal, contrary to the constitution of that body, and beyond and inconsistent with the power granted to that body by their charter of incorporation,—the ground upon which that is sought to be set aside, and which raises indeed the whole of the more material part of the question now before this House, is that it was inconsistent with the objects and purposes of the Society and of the Corporation.

My Lords, if any application had been made of the funds of the Corporation, other than that which is within the scope of the purpose for which that corporation was created, past all doubt

that would have been an illegal act, which they were not en titled to do by their corporate power, and by the constitutio to which they owed their existence. Let us ask in the fir place, therefore, what is the nature of this body, and what mus be deemed and taken to be the purposes of its creation? It i for the purpose, says the charter, by reference at least to th articles of agreement,—for the purpose of following out an giving effect to the two Acts of Sederunt, regulating the admissio of solicitors, and for certain other purposes which are specifie in the original articles of agreement. And by reference to thos articles, with the gloss put upon them, which possibly may no be the necessary construction, but which, nevertheless, I am in clined to think, for one, is the reasonable construction, thoug perhaps not the inevitable construction, of those articles, they ar these, namely the formation of a library; the providing for de cayed members, "*defectorum*," as they are called; and the pro viding also for the widows and children; the articles of agree ment only saying, "Indigent members, widows, and children." The charter of incorporation construing those words as if "indi "gent" applied to the whole three members of the sentence, t the widows and children, as well as to the members "in rebu egenis morientium," the widows and children of members de ceased in poor or needy circumstances.

Now I most certainly do not hold that, because a particul purpose is specified, and because a particular fund is described having been collected for that purpose, which is all that th articles of agreement say, and which is all that the charter incorporation, by reference to those articles, says: I do not all see, that because there is this specification of one purpose, say three purposes, the library, the widows, and the childre there is, therefore, of necessity an exclusion of all other obje and all other purposes; and that because they are supposed have in their view to do the one thing, they are therefo to be supposed not only not to have in their view to do an

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other thing, but are excluded from doing any other thing. Consequently it becomes, on this account, very immaterial whether you construe it in the one way or in the other; whether you take "indigent" as the appellant contends you are to take it, as confined to the first word following, namely, "members," or whether you take it as the charter of incorporation takes it, as riding over the other two, and as belonging to the widows and children as well as to the members; because though they might have a fund to provide for the widows and children of poor members, as well as a library, and though they might have that purpose and object, yet they might very well have other objects and purposes, namely, to provide a fund generally for widows, not confined to those of members deceased in *rebus egenis*.

It must be observed, that wherever a widow's fund is formed and established, and happily that is very often an object of associations of this description, from that of the clergy in Scotland, which is the most remarkable and beneficial instance of its application which perhaps has ever been known, and which has been most admirably managed from its first formation, under the most venerable, and learned, and able professor and great political arithmetician Dr. Webster, who was the original founder of it, and afterwards superintended and most ably administered and improved by my late venerable friend Sir Harry Moncrieff, as long as he was a distinguished Father and Minister of that Church;—from that down to very inferior bodies, these foundations are very much to be commended for their object; they are eminently useful, and they are, generally speaking, framed on exceedingly sound principles. They all proceed upon this,—they are for the widows and children, particularly widows, of professional men, whose income, never very large, never such as to enable them to make ample provision for their successors and their widows, dies with them; and therefore all these plans proceed upon the assumption that the death of the person, or the

coming into existence of the widow, to which his death is a necessary condition precedent, will leave that widow somewhat in embarrassed circumstances, for there will be of course withdrawn from her means of support all the professional income which was only for the life of her husband. Therefore that is the general presumption of fact, though one no doubt to which there will be exceptions in some cases, but very rarely, that the widow will be in poor circumstances, even although the person did not himself die in poor circumstances.

The only objection to the construction indirectly put, but clearly put by the charter, upon the words "indigent members "and their widows and children," in the articles, is this: that a person may not have been indigent and may not have died *in rebus egenis*, and yet his widow and children, from his removal and the withdrawal of his income from them, may be in want though he could not, strictly and correctly speaking, be said to have been an indigent person himself. I think it is very possible that that may be the view taken of it, that it meant indigent members and the widows of indigent members, though do not quarrel with the construction in the charter, for it not necessary to dispose of that in the view I take of the matter that it may mean indigent members and indigent widows and children, though not the widows and children of indigent members, but indigent widows and children in consequence of their being deprived of the professional income of the parent, and consequently more or less generally, with few exceptions, placed in circumstances to warrant such a provision.

Now, my Lords, could anything be more within the scope of this Society of Solicitors and Procurators than to provide for their widows and children, if indigent, when they themselves should be removed from the scene of their labours and their profits? It appears to me to be the most natural and simple view that can be taken of it, and that this was just as obvious a subject of their consideration, as tha having a library, or the

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having a hall to meet in, a hall, indeed, not being specified, but it was said in the course of the argument more than once, that they had a right to provide for themselves that accommodation out of such a fund.

Now it is said, and much stress is laid upon that, both at the bar and by one of the learned judges, Lord Fullerton, in the judgment, that this is neither more nor less than an insurance. To be sure it is,—no doubt it is. But there is no magic in the word "insurance." It seems to be argued, that the moment you find out that it is an insurance, there is an end of the question, because it is an insurance, and this body had no right to become insurers. But why had they not? It is an insurance within itself. If they had opened a shop for insuring other people, and had let all strangers come among them in order to take the benefit of their fund, and by insuring their own lives to provide for their widows, it would have been a totally different question. I do not say that they had no right to do such a thing, that it is beyond the scope of their articles, and beyond the scope of the charter incorporating them as a body; but this is merely an arrangement which they make *intra parietes* of their own Society, within the body corporate which they themselves composed by the charter creating them a body corporate. It is all within themselves, and they make that arrangement, some arrangement of that sort being absolutely necessary, in order to accomplish that object, because they cannot say, We will raise a fund to provide for the widows of all, whether they subscribe to it or not.

It is said that this is a Society within a Society; you may say the same with respect to a committee of a Society. Every committee of a corporate body, formed by itself for the purpose of pursuing conveniently the objects of its incorporation, is a society or corporation within itself. No corporate body could ever carry on its business without forming some such committees. They may form a committee for one purpose and a committee

for another purpose. Here they have not a committee, but they have a plan by which they say, Every member of this Society who chooses to become a subscriber to this fund, shall have the benefit of this fund.

But it is said if the members are in bad health they are not allowed to subscribe, and that if they do not subscribe immediately they are not to be allowed to lie by. To be sure; there must be some limit in both those views; it is self-defence, the fund must be protected by the Society, otherwise what would happen? A man would lie by and let other people subscribe and raise the fund, and when he thought he was likely to leave a widow after he had lived so many years and become an old man, portion his widow out of that fund, having, when he was in good health, kept his money and spent it in other things, perhaps in providing for his widow in other ways, but the moment he fell into bad health and had the prospect of leaving a widow, subscribing to the fund. To provide against those two obvious frauds, it is quite clear some such regulation must be adopted and accordingly a regulation has been adopted, and I can see no impropriety in it. On the contrary, it is an exceedingly just and equal regulation, and I profess myself totally unable to understand what one of the learned Judges says, namely, that it is against the laws of equity; that is a code with which I am not acquainted, probably. If the learned Judge means that was contrary to fairness, I must say that in my opinion it perfectly fair dealing, and that it would be foul dealing, in my opinion, to take any other course, and very improvident and indiscreet. This appears upon the whole, to be a very reasonable and fair, or if we choose to use the word in the common and popular sense of it, and not with a technical meaning, a very equitable mode of proceeding, and it seems to me this is a proceeding clearly within the scope of the Society; and that something of this kind they must have had in view when they were seeking to be incorporated. I venture to say, that hardly any

one ever thought of the formation of such a Society or Incorporation for the purpose of providing for decayed members, and for their widows and children after the father should cease to support them by his professional labours, who would not, as a matter of course, make such regulations.

Cases have been mentioned,—that of the Fleshers of Glasgow is a very strong case indeed,—but the view I have taken does not appear to me to require the support of other cases.

With respect to the second point as to the *personalis exceptio*, it turns out that Mr. Henderson is the only actor here, that the others are only concurrents. I do not see how Mr. Henderson, upon any principle of Scotch or English law, (we are now upon Scotch law,) could lie by and do as he did in this case, and then come forward afterwards and object to all that had been done. But, however, that has not been the ground taken or disposed of by the learned Judges in the Court below, and I may dispense with any necessity of disposing of it here, in my opinion, because it does not arise unless I should be of opinion with the respondent and against the Society of Solicitors upon the first point, which I do not happen to be. Therefore, though entertaining great respect for the judgment of the Court below, the learned Judges do not appear to me to have given in this case, the same careful attention which they almost always do to important subjects coming before them; and I agree with the Lord Ordinary, who has given a most able and elaborate opinion, though it is not a judgment, for the satisfaction of his learned brethren. On these grounds I am of opinion that this judgment ought to be reversed.

We cannot give costs here, we never do that in case of reversal; but the present appellants have been condemned in costs in the Court below, and they must not only be relieved from that, but they must have their costs in the Court below. The *personalis exceptio* comes in very strongly there upon the question of costs.

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LORD COTTENHAM.—My Lords, I am also of opinion that the interlocutor of the Court of Session ought to be reversed, and I come to this conclusion without thinking it at all necessary to enter into the consideration of how far the terms of the charter depart from the terms of the original articles. Looking at either the one or the other, there was undoubtedly power in the Society to appropriate a portion of their funds to the relief of the widows and orphans of members. There is no rule prescribed either in the one or the other, as to the test by which the qualification of an individual claiming the benefit of that provision shall be ascertained. That was necessarily left to the regulation of the Society itself. Now all that the Society have done is this. They have said, We will appropriate a certain portion of our funds actually realized, constituting 750*l.*, and a certain portion of the funds hereafter to be realized, either by the payment on the entrance, or by the annual contribution of members of the Society, towards the relief of widows of members; but we will establish this test; we will give it to those widows whose husbands shall have become subscribers to the Widows' Fund. The question is whether that was a test which the Society were not at liberty to adopt. Now, my Lords, I confess it appears to me to be one of the very best tests which they could have adopted. It is a test, in the first place, of the widow being in circumstances which made it, in the opinion of the husband at least, expedient that a fund should be secured out of his annual income for the maintenance of that widow after his death. It is also a desirable arrangement, because it is an encouragement to the husband in his lifetime to save out of an income, which, if he has any, is probably an income which will determine with his own life, the means of providing for his family after his death. It is, therefore, adopting a test which, though very likely not universally applicable, yet is likely to meet the generality of the objects which may occur, and at the same time affording a very wholesome encouragement to economy and good management

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the husband during his lifetime. It is no objection to the scheme that it does not include all the members. Adopt what test you will as to those who are to take the benefit of this fund, it does not apply to all the members. Take any other test of indigence, those who were not indigent would not claim the benefit of it; those who do not come under the description of indigent, would not be entitled to its benefit. So that in no possible way of applying this fund, can you make it applicable to all the members. All the members have an interest in it beyond all doubt, for all the members may come under circumstances which would entitle them to the benefit of it; but the actual recipients of the benefit must necessarily be confined to a certain class of those who constitute the whole Society.

Now, my Lords, alluding to what has been so much urged, and with so much apparent earnestness as if it was really decisive of the whole case, namely, that this was an Insurance Company, it is not necessary for me to give an opinion of what the result would be if it were so. I apprehend it would be very difficult to question an arrangement of this sort. Suppose the rule had been, We will give a certain portion of this fund to every individual who, by his own subscription to any Insurance Company, shall have realized a certain sum for the benefit of his widow, we will not open it to any strangers, but we will make the act of the husband in providing for his widow after his death the test by which the right of the widow to aid from the Society shall be tried, I do not at this moment see any possible objection that there could have been to that test. Here the whole Society is within itself; the insurance is among the individual members of the Society. It is not, therefore, open to any objection as to applying the funds of the Society to the profit of any but those who contribute themselves, or who, by becoming members of the Society, have become interested in the general funds of the Society. The Court of Session have declared that this arrangement, and the rules which have been laid down and made by the

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Society for the purpose of carrying that arrangement into effect, are illegal, meaning that they are beyond the powers of the Society. I cannot view it in that light; but these appear to me to be very wholesome regulations by which the application of the fund is provided for. On the merits of this case, therefore, I have no doubt that the judgment of the Court of Session is not supported by the document on which it professes to have proceeded.

My Lords, being of the opinion I have stated, it is not necessary for me to say anything on the other part of the case, namely, how far, assuming this law not to be within the power of the articles or the charter, the present plaintiff has a right to come to the Court of Session to ask for the interposition of the Court. He asks nothing for himself. If he were to succeed in that part of the summons which seeks a repetition of the sums paid either by the widows, or by those into whose hands the money has passed from those widows, that money so to be received again could only come into the funds of the Society. Individually he asks nothing; he is sueing the corporation in his individual character, he having for many years been a member of that Society; not when the Act was passed; not when the order was made which is now in question; but when it was in active operation, having permitted every member who has been a member during that period to contribute his money, those who have become members since by the payment of the entrance money, and those who were members before by their annual contributions; he has permitted those funds to be accumulated, and he has permitted persons to go on subscribing to those funds, in the expectation of their widows and orphans in case of their death deriving a benefit from them; but during the whole of that time he has not complained. He comes at last, and seeks by the Interlocutor of the Court of Session to deprive all those members who have so contributed to the fund of the benefit for which they have paid by their contribution, and obtains an order

stopping the future application of the fund for that purpose. If it were necessary to express an opinion upon that subject, which it is not, I should have thought it very difficult for a person standing in the situation of Mr. Henderson, after what has taken place, to be permitted to obtain an Interlocutor for those purposes which he has in view. However, upon this proceeding, taking the first ground, I have no hesitation in expressing my opinion that the Interlocutor of the Court of Session should be reversed.

LORD CAMPBELL.—My Lords, your Lordships have been put into full possession of this case by the able arguments on both sides of the bar, and I am sure that Mr. Moir need have made no apology at all, because he treated the subject in a very lucid and able manner, and we heard him with great satisfaction, as we have done on former occasions when we have had the advantage of his assistance at the bar.

My Lords, I have gone through these papers with very great attention, and the result is that I cordially concur in the opinion expressed by my noble and learned friends, that the Interlocutor complained of must be reversed. It seems to me that the Lord Ordinary took a just and sound view of the subject, and I rather regret that having so clear an opinion, he did not act upon it, and pronounce an Interlocutor, which I am sure would have been looked to with great respect when it came before the Judges of the First Division, and which might have saved us the necessity of hearing the appeal.

My Lords, I feel bound to say that on both grounds the Interlocutor must be reversed. With regard to the personal exception, I look with great surprise at the opinions delivered by the learned Judges. I find that they seem entirely to have overlooked it, although before deciding in favour of the pursuers, they were bound to overrule that plea, though according to the view taken by my noble and learned friends who have preceded me, it is not necessary to express an opinion upon that point if

you decide in favour of the present appellants the defenders below; but if you decide in favour of the pursuers, it is indispensable to overrule that plea. I find, however, when I look at the opinions of the learned Judges, that they expressly confine themselves to the merits, and seem studiously to avoid grappling with that question. Now, my Lords, I must say that I entertain no doubt at all that Mr. Henderson, the pursuer, is barred by personal exception, both with respect to suspension, and the action of reduction. In the suspension he prays that this bye-law may not be acted upon in future, "reserving to the com- "plainer all right and title to insist and sue for repetition for "behoof and benefit of the Incorporated Society, as a body, of "the sums exacted from him and all other members, and illegally "appropriated to the said private Widows' Fund." Therefore, he expressly reserves to himself, and by the decree of the Court as it now stands, that is reserved to him, that he shall bring an action for repetition, contending that all that has been done under the bye-law shall be considered as null and illegal, and shall be entirely altered and reversed.

Then when you come to look at the action of reduction, he prays "that the aforesaid pretended bye-law, minutes, and reso- "lutions now called for of the Incorporated Society, being seen "and considered, the same, with all that has followed or may "follow thereupon, ought and should be reduced, retreated, "rescinded, cassed, annulled, decerned, and declared to have "been from the beginning, to be now, and in all time coming "null and void, and of no avail, force, strength, or effect "judgment or out with the same in time coming, and the pur- "suers reponed and restored thereagainst *in integrum*." Who now, my Lords, who is Mr. Henderson who makes this prayer his suspension and this action of reduction? It is not supposed nothing so preposterous is argued at the bar, as that if a person has submitted for a certain time to an illegal act, he may not afterwards resist it; but what has Mr. Henderson done?

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joins the Society in the year 1823, with the full knowledge of this bye-law, and instead of resisting it, he yields to it. He pays annually his subscription; he knows how it is applied; and he holds out an inducement to others to join this Society upon the footing of this bye-law. Then how unjust would it have been for him in the year 1839 to be allowed to come and say "All this is illegal. I have induced many members to enter "and now they shall be deprived of the benefit which I held out "to them as an inducement to become members of this Society." I know not what Mr. Henderson's domestic circumstances may be. He may be an old bachelor who has determined never to marry; or he may be a widower, and he may think that neither he nor any of those dependent upon him may derive any benefit from the system which has been acted upon, and therefore he may desire to deprive those who have been contributing for years upon his recommendation of the power of deriving, through their widows, any benefit from their subscription. It is not enough to say that he wishes only to put an end to it in future; if he did put an end to it in future, those who have contributed to it hitherto would not receive the benefit which they had reason to expect, for there would be no fund continued to be created from which the annuities could be paid to the widows of those who have contributed. My Lords, there can be no doubt that by the law of England this personal exception would prevail. I am glad to find that there are authorities expressly in point to show that the law of Scotland is the same; and I apprehend that such a principle must be acted upon wherever law has been considered and cultivated as a science.

Then, my Lords, upon the merits, I entertain the opinion, that the funds of this Society certainly cannot be capriciously disposed, they cannot be applied to any purpose beyond the scope of the original constitution. There cannot be an application of them to any patriotic fund, or for the building of churches, or the carrying on a railroad between Edinburgh and London, or

anything of that kind. But, my Lords, any purpose that is withi the scope of the original undertaking, which may fairly be con sidered as within the contemplation of the members when the formed this institution, or when they joined it, seems to be *intr vires*, and to be allowable and perfectly justifiable. When w look to the articles under which this Society was instituted, w find one of the purposes expressly mentioned in them is, th relief of indigent members, widows, and children, and such othe purposes as shall appear proper. There the sustentation o widows was one of the original purposes for which the Societ was instituted. The charter, which was obtained in the yea 1795, did not in the slightest degree mean to interfere with an of the purposes which were in contemplation when the Societ was formed. There is in the recital of the original articles wha I should consider to be a mistranslation, but supposing that were putting a just meaning upon the words in the origin article, that they must be considered as meaning widows indigent members, I apprehend that it would not at all b beyond the power of the Society to make this alteratio because they might have found that it was extremely inco venient to consider, when a member died, whether he w indigent or whether he was wealthy, it would lead to ve distressing and very humiliating inquiries, and it was mu better to resort to some other test with regard to the wido who should have the benefit of this fund. That being so, apprehend that this bye-law of 1817 was perfectly justifia either under the original articles or under the charter.

My Lords, it was intimated, I think, by the Attorn General, that this regulation had been found to be inconvenie that it had worked badly, and had reduced the Society poverty. If that be so, then the body may alter it; the po that they had to frame this belongs to them still, and they m rescind it, or they may alter it in any manner in which t may think it most expedient, so that the purposes of this Soc may be fully carried out.

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For these reasons, my Lords, I am clearly of opinion that the view taken of this subject by the Lord Ordinary was the sound and correct one, and that the Interlocutor complained of ought to be reversed, and that the costs of the defenders below (the appellants before your Lordships,) ought to be reimbursed, because it seems to me, in every point of view, to be an extremely improper proceeding on the part of Mr. Henderson, and those who have joined him in the suit.

Ordered and Adjudged, That the Interlocutors complained of in the appeal be reversed. And it is further ordered and adjudged, that the reason of suspension in the said appeal mentioned be repelled; that the reasons of reduction be repelled, and that the appellants (defenders) be assoilzied from the whole conclusions of the said action of reduction and declarator; and that the said respondents do pay to the said appellants the costs found due and decerned for by the said Interlocutors appealed from, if paid, by the said appellants under such Interlocutors. And it is further ordered, that the said respondents do pay to the said appellants costs incurred by them in the Court of Session in the said process of suspension and reduction and declarator. And it is also further ordered, that the said cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

DEANS, DUNLOP, and HOPE—SPOTTISWOODE and ROBERTSON, Agents.

THE RIGHT HON. CHARLES LORD BLANTYRE, *Appellant.*

THE RIGHT HON. THE EARL OF WEMYSS AND MARCH, and THE HON. CAPT. KEITH, *Respondents.*

Res Judicata.—A judgment upon a question raised, but not material or necessary for the decision of the issue between the parties, will not form *res judicata.*

Res Judicata.—Teinds.—Locality.—Semble.—That a judgment in one process of locality upon a point in issue between the parties will form *res judicata* in a subsequent locality.

IN the year 1650 the minister of Haddington obtained an augmentation of his stipend. The stipend, as so augmented, was levied from time to time by the successive incumbents of the parish, without its having been localled on the heritors.

Betwixt the year 1650 and the year 1710 the parish of Gladsmuir was erected and part of the lands of the parish of Haddington were disjoined from that parish and annexed to Gladsmuir.

In the year 1710 the then incumbent of the parish of Haddington, experiencing difficulty in obtaining payment of his stipend, brought a process for having it localled, and for having the stipend withdrawn by the annexation of part of the lands to Gladsmuir localled upon the other teinds of the parish of Haddington. In that action appearance was made for the proprietors of Bearford, and Easter and Wester Monkrigg, the predecessors of the respondents.

On the 8th February, 1710, the minister obtained a decree of locality, which set forth that certain specified heritors objected to the scheme of locality that they had heritable rights to their teinds, and that they could not, therefore, be obliged to pay beyond what they had been in use to pay since the decree of

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augmentation, so long as there were free teinds within the parish, which they alleged there were; that the Lord Ordinary, "before answer as to the manner of locallingh, allowed a conjunct "probation for proving the value of the free teind," that "thereafter the procurator for Hepburn of Munkrigg craved absolvitor, in respect his lands were kirk-lands, feued out *cum decimis inclusis* before the act of annexation, as appeared by the writs produced, and that they were never in use of paying any part of the stipend; which being likewayes considered by the Lord Ordinar, he, in respect of the writs produced, and that they were never in use of payment, fand that the lands of Munkrigg could not be liable in any part of the stipend. Thereafter the pror. for Hepburn of Bearfoord alleadged that the lands of Bearfoord, Easter Munkriggs, and Cotwaills, being kirk-lands fewed out *cum decimis inclusis* before the act of annexation, could not be liable to any part of the stipend: whereunto Mr. Alexander Hay, advocat, answered, that Bearfoord and his predecessors have allwayes been in use of paying of a part of the stipend since the year 1650, and how farr soever his rights might free him from any furder payment, yett he ought still to continue to pay as formerly: Whereunto Bearfoord's pror. answered, that at the time the use of payment was first introduced, the lands were in a liferentrixe's hands, and they have not as yett been fourty in use of payment without interruption, by minorities, soe that the said lands ought not only to be exeemed from paytt. of any part of the augmentation, but lykewayes from payment of what was wrongously imposed upon them formerly, and he had raised a reduction and declarator of exemption, which he then repeated: Whereunto the said Mr. Alexr. Hay, as pror. aforesaid, dupleyed, thatt thirteen years possession by a minister prescrived a right to the subject possesst, and Bearfoord could not refuse but he had paid much more than thirteen years without interruption by minorities or otherwayes: which being

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" in like manner considered by the said Lord Ordinar, he, in
" respect of Bearfoord's use of payment ordained him to con—
" tinue to pay the same quantity of the stipend formerly paid by
" him and his predecessors, and in respect of the writts produced
" assoilzied him from all furder payment of stypend."

The decree further set forth that Hepburn had presented a petition against an interlocutor, ordaining him to continue the same payment which his predecessors had been in use to make, and that " thereafter upon the 24th day of November " 1708 years, the said action and cause being again called, an- " parties compearing as above, the purs.'s prors. craved that th " Lord Fountainhall's report might be read, and that the Lor " would determine the point y^e^by remitted to them, viz., wheth- " that part of the stipend as yet unallocat, should be in t " first place allocat upon the teinds of other men's lands, whi- " was in the hands of titulars or their tacksmen, or upon the " teinds of the paroch in generall. Whereupon the pror. for " the toun of Haddingtoun, Alderston, Sir Robert Sinclair, and " others alleadged, that the stipend ought, in the first place, to " be allocat upon the free teind of the paroch before any part of " the teinds belonging heretably to the heretors of the lands " could be burdened; and as that was most agreeable to law, " soe it was to their Lordships' daily practice in the like cases. " Whereupon the pror. for the Lord Blantyre, &c., alleadged " that the stipend as yett unallocate ought to be allocat upon " the teinds of the haill paroch equally, notwithstanding of the " rights produced for thir reasons,—*first*, no teind could be " exeemed from payment of a minister's stipend, nor could any " right exeem the land of a paroch till the minister had been " sufficiently provided, except such lands as were fewed out by " kirkmen, *cum decimis inclusis quæ nunquam a stipite antea* " *separatæ fuerunt*, which could not be pretended in that case; " on the contrair, the rights produced were not heritable rights, " but only flows from a tacksman, as was evident from Sir

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" Robert Sinclair and the Laird of Colstoun's productions; so " that these heretors, who possessed the teinds of their own " lands, be virtue of rights flowing from a tacksman, could be in " no better case than others who possessed teinds be virtue of a " standing tack. Whereunto it was answred by Mr. Alex. Hay, " advocat, that he opponed the rights produced, which was char- " ters and infeftments of the teinds; and albeit that heretable " rights to the teinds could not exeem the proprietors from aug- " mentation of stipends, where there were no other teinds in the " paroch besides; yett wherever there was free teind, the samen " ought to be exhausted before the teind heritably conveyed to the " heretor could be burdened. Whereupon, Sir Francis Grant, " advocat, as pror. for Hepburn of Bearfoord, repeated the peti- " tion, and craved that his lands might be wholly exeemed from " payment of any part of the stipend, in respect he holds his " lands *cum decimis inclusis* as appeared from the writs produced. " Whereunto the prors. for the other heretors answered ought to " be repelled; *Primo*, because the rights produced were not such " as could exeem the land from teind; for albeit the rights to the " lands of Bearfoord bear *cum decimis inclusis*, yett it did not " bear the words *nunquam antea separabantur*, from which it " appeared that they had been formerly *separatæ;* and being " once formerly separate, they ought to remain separate, soe as " to be subject to the payment of stipend; and the rights pro- " duced to the teinds of his other lands did bear only *cum* " *decimis in garbalibus*, which could noe manner of way be in- " terpreted to be other than ane heritable right to the teind " sheaves which had been formerly in use to be drawen; but, to " put the matter beyond all question, as the rights produced did " not bear the ordinar clauses anent *decimæ inclusæ*, soe they " could not doe it, because, by a channon of the Latheron " Councill, kirkmen were expressly prohibited to feu out lands " *cum decimis inclusis*, and the erection of the Abbacy of New- " bottle, of which thir teinds was a part, was not till after the

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" Latheron Councill. But farder the Laird of Bearfoord and his
" predecessors had been in use of payment of a part of the
" stipend past prescription. Whereupon Bearfoord's pror.
" replied, that the rights produced clearly instructed his lands
" to be kirk lands, fewed out by kirkmen, *cum decimis inclusis*,
" which was all was necessary for him to instruct, and albeit
" they wanted these words of style, *quæ numquam antea separa-*
" *bantur*, that could never annul the right, the word *inclusis*
" comprehending all. And for the history of the erection of th
" Abbey of Newbottle, whether it was befor or after the Lathe
" ron Councill was a matter Bearfoord neither knew nor wa
" obliged to know; and for the use of payment, the samen wa
" introduced when the lands was life-rented, and it was know
" to the Lords how long they continued in that state. Wher
" unto the prors. for the heretors duplyed, that whatever st
" the lands was in when the burden was imposed, yett since t
" liferentrix died, the ministers had been in possession upwa
" of thirteen years, which prescrived a right to them: wh
" being considered by the said Lords, they refused the desire
" Bearfoord's bill, and adhered to the Lord Fountainhall's int
" locutor, finding that Bearfoord ought to continue to pay
" proportion of stipend formerly in use to be payed by him,
" exeeming his lands from all furder payment, and fand t
" the teinds in the hands of titulars or tacksmen, or other me
" lands ought to have been, in the first place, allocat, notwi
" standing of the currency of the tacks, and remitted to the L
" Fountainhall to prepare the locallity accordingly."

In the year 1822, the first and second ministers of Haddi
ton, which is a collegiate charge, respectively brought action
augmentation, modification, and locality. In these acti
decrees of augmentation were given, and a scheme of locality
ordered to be prepared. In the course of framing the sche
the common agent gave effect to a claim of exemption set up
the respondents upon a clause "*cum decimis inclusis*" contai

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in their charters. The other heritors objected to this claim that the clause did not support it, inasmuch as the words "*et nunquam antea separatis*" were awanting. The respondents, in answer, relied upon the decree of 1710 as *res judicata*, that the lands were to continue their former use of payment, but were "exeemed from all further payment."

The Lord Ordinary (*Cunninghame*) on the 16th January, 1838, sustained the claim of exemption by an interlocutor in these terms:—"The Lord Ordinary having considered the "revised objections and answers, and whole process, and having "particularly examined the proceedings in the process of locality "relative to this parish, which terminated in a decreet of "locality, pronounced on the 8th February, 1710, excerpts "from which have been lately produced: Finds, that the said "former process of locality commenced in the year 1707, and "that appearance was made therein for the predecesors of the "whole parties, both objectors and respondents in whose behalf "pleas are stated in the present process: Finds, that the record "of the former process affords clear evidence that the judgment "pronounced in the said process, exempting the lands of the "present respondents from allocation, as held *cum decimis inclusis*, were neither pronounced *in absence* nor *per incuriam*, "but on a deliberate discussion and consideration of the law as "then understood: Finds that the objectors, as representing or "standing in the place of heritors who were parties to the said "former locality, cannot be allowed, more especially after the "judgments in the said process have been acquiesced in and "acted on for above 120 years, to call in question the said judgments, or to maintain that the respondents' titles are not "sufficient to exempt them from stipend, on the ground that a "different view of the law applicable to such titles has been "taken by the Court in cases of comparatively recent date, "occurring in other parishes; Therefore, of new repels the objections stated for Lord Blantyre and others, finds the respondents

" entitled to expences, and remits the account thereof, when " lodged, to the auditor, to tax and report."

' *Note.*—The proceedings in the former locality, when ' minutely examined, appear sufficient to obviate the objections ' in the present case, and demonstrate that these objections are ' not tenable either in fact or in law. Indeed, it is thought that, ' if the present objections were sustained, the decision would be ' not a little dangerous in point of precedent.

' So far as the Lord Ordinary can trace the parties, every ' property for the owner of which appearance is made in the ' present process, was represented in the locality of 1707-10, and ' their attention was particularly called to the very question now ' proposed to be revived. Here the excerpts from the old record ' (printed since the case was last before the Court in May, 1836) ' deserve to be particularly examined.

' These excerpts show that the whole titles of the respondents' ' predecessors, from 1567 to 1686, were produced. It is also ' established that, on 17th February, 1708, Lord Fountainhall ' pronounced an interlocutor as to the lands of Hepburn of ' Wester Monkrigg (predecessor of Captain Keith), finding, " that the said lands, *in respect of the writs produced*, and that " they were never in use of payment, could not be liable in any " part of the stipend.'

' That judgment was not brought under review, for a reason ' which is perfectly obvious from the record. The excerpts, after ' setting forth the preceding interlocutor as to Wester Monkrigg, ' proceeded to narrate the judgment of the Lord Ordinary as to ' the lands of Bearford and Easter Monkrigg, then belonging to ' Robert Hepburn (the predecessor of Lord Wemyss). His ' pleas are first set forth, and then the Lord Ordinary (Foun- ' tainhall), ' in respect of Bearford's *use of payment*, ordained him " to continue to pay the same quantity of stipend formerly paid " by him and his predecessor; and, *in respect of the writs pro-*

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'*duced*, assoilzied him from all furder payment of stipend.' 'This interlocutor, *having been fully brought under review of the* '*Court*, it was unnecessary for the heritors to contest the decision 'as to *Wester* Monkrigg, till the fate of Hepburn of Bearford's 'plea was ascertained. Accordingly, the excerpts show that 'Bearford's plea was as fully, or, at least, as clearly stated to the 'Court in 1708, as it could be at the present day. Bearford 'reclaimed against the Lord Ordinary's interlocutor; and the 'Court, on 2nd June, 1708, ordered the petition to be seen 'and answered in eight days, and declared 'They would hear "parties *on the said cause*, and the Lord Fountainhall's report "the same day.' Accordingly, the excerpts show that appear-'ance was made for Lord Blantyre; and that he urged, at 'length, the very plea on the merits now indicated by the 'objectors—viz., that the clause in the respondents' titles wanted 'the words '*nunquam antea separatis*.' The plea was probably 'elaborately argued *viva voce*, as the first counsel at the bar of 'that day seem to have been employed for the parties. Never-'theless, the Lords adhered to the Lord Ordinary's interlocutor; 'and, that being the judgment of the whole Court as to Bearford, 'any separate argument to the Inner House, in the case of 'Monkrigg, was unnecessary.

'It is on reference to these proceedings that the Lord Ordi-'nary is of opinion here, that there is no room for holding that 'the decree in favour of the respondents' predecessors, was a 'decree in absence. It was manifestly a decree *in foro con-'tentiosissimo*, as to Bearford; and latterly the judgment of 'the Lord Ordinary, as to Monkrigg, was *purposely* allowed to 'become final, because the opinion of the Court on Bearford's 'title, in the same parish, was decisive of Monkrigg's case.

'This brings the question here to the point raised by the 'objectors, who argue that no judgment, in one locality, can 'ever form *res judicata*, as to the augmentation to be provided 'for in a *subsequent* locality; or to any effect beyond the alloca-

'tion which may be the subject of discussion when the argument
'took place. But the Lord Ordinary can find no authority for
'that proposition, which he has always understood to be quite
'adverse to the understanding of the country and of practitioners.
'A great many questions of warrandice as to stipends and aug-
'mentations, have been tried during the last thirty years, in
'processes of *locality*. See, in particular, the case of the Earl
'of Hopetoun *v.* Jardine, 3rd July, 1811; Trustees of Lord
'Hopetoun *v.* Copeland, 8th December, 1819; case of Major
'M'Donald, Powderhall, *v.* Heriot's Hospital; and various other
'cases, reported in Shaw's *Teind Cases*, pp. 134-268. Besides,
'nearly the whole questions as to claims for exemption on
'*decimæ inclusæ* titles, have all been tried in localities. See
'a great variety of these cases (all tried in localities), enume-
'rated in the last edition of Sir John Connell's work on teinds,
'vol. ii., pp. 24-37, &c. Indeed, the very case of Ochterlony,
'in which President Blair so fully explained his views on this
'obscure subject, occurred in the locality of Carmyllie. But,
'according to the argument of the objectors, the decision of that
'case and all other contested questions of title or warrandice, if
'decided in localities, will not form *res judicata* in any future
'locality of the same parish, *quoad* subsequent augmentations, if
'any succeeding heritor choose to renew the litigation.

'The Lord Ordinary thinks that this doctrine would be alike
'oppressive to heritors, and contrary to all the authority and
'legal analogies applicable to the question. After the Union,
'the Commission of Teinds had all the permanency and juris-
'diction of a court of law in teind matters; and, if parties once
'join issue there, and have the legal construction and effect of
'their titles, as rendering their estates subject to, or exempt
'from, teinds, determined *in foro* in a locality, it would be both
'unnecessary and vexatious to allow either these parties them-
'selves, or their heirs and successors, to renew the very same
'argument as to the same estate in any future process, whether

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it be locality or declarator. Indeed, it is thought that a locality is the most fit and appropriate process for ascertaining finally and permanently the nature of a title, as comprehending or excluding a *decimæ inclusæ* right.

'It may be added, that the plea of *res judicata*, founded on a judgment in a previous locality, appears to have been one of the pleas sustained in the reduction, Lawson *v.* Lindsay, Shaw's *Teind Cases*, 3rd July, 1822. There, no doubt the title of exemption libelled on appears to have been such as would have been sufficient to exempt Lawson's lands, even according to the law of *decimæ inclusæ*, as latterly understood. 'But here it deserves particular notice, that Bearford's right to 'exemption, in 1708, was pronounced, not simply in a process of 'locality, but *in a reduction* which he raised expressly to try his 'right; so that, if the judgment in such a process was not suffi- 'cient finally to ascertain his right, it is not very easy to see 'how it could ever be determined.'

The Court (1st division) on the 22nd of May, 1838, adhered by a majority to the Lord Ordinary's interlocutor.

The appeal was against these interlocutors.

Mr. Kelly and Mr. J. G. Bell, for the Appellants.—In every new process of augmentation, the localling of the augmentation as between the heritors is according to the existing titles, which must be produced, without reference to any prior augmentation or locality. Here no titles are produced, but the respondents rest their claim of exemption from liability upon the decree of 1710, which was pronounced in a distinct and independent process. The questions between the parties therefore are,—1st, whether in any case a decree pronounced in one process of locality can form *res judicata* in another process in regard to the same parish; and 2nd, assuming this question to be decided in the affirmative, then whether in this case the decree of 1710 can form *res judicata*.

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I. The Commission of Teinds as originally constituted wa not intended to determine any question of legal right, but merel to perform the ministerial duty of seeing that proper provisio was made out of the teinds of each parish for the maintenance c its minister. Accordingly the Commissioners were selected, nc from the legal profession, but from each of the different estate of the realm. When in later times the powers of the Commis sion were transferred to the Judges of the Court of Session, n alteration was made in the nature of its jurisdiction; accordingl all the machinery by which the powers of the Commission wei carried out were kept separate and distinct from those by whic the Court of Session carried out its ordinary jurisdiction; n doubt the Commissioners in localling stipends have occasionall determined incidental questions of legal right, but they hav done so only so far as was necessary to explicate their admitte jurisdiction. This is an exercise of jurisdiction competent t every Court, *Ersk.* i., 28, but it will not confer the power t adjudicate upon such questions when original and primary, an it was never so considered in regard to the Commission. Mon musk *v.* Pitfoddels, *Mor.* 15644 and 15718.

Further, *res judicata* can be founded only upon pleadin properly framed for trying the particular question; but the pr cess of locality either in the frame of its summons or in the for of its procedure, is no way adapted for the trial of questions right as between the heritors. The summons is at the instan of the minister against the heritors, not between the heritors pursuers and defenders; it is confined to the particular augmen tion sought to be localled, and does not give any intimation even suggestion to the body of heritors of any claim or right be set up by any particular heritor. And even if the herit should in the subsequent procedure obtain intimation of t claim or right set up, it may in that particular locality be as them altogether an abstract question in which they have interest, although in a subsequent locality of a further au

mentation it may have changed its character and become a question which the heritors have a material interest to discuss. The former was the case in the present instance, for by the decree of 1710 the augmentation was localled upon the free teinds, so that the predecessors of the appellant had no interest to discuss the claim of exemption set up by the predecessors of the respondents. It is attempted to be maintained, but cannot be seriously argued, that a reduction and declarator was conjoined with the locality, and so it is called in the decree; but on examination of the summons it turns out to be a simple reduction without a single conclusion for declarator of exemption.

II. The decree of 1710 cannot form *res judicata*. 1. Because the Court had no jurisdiction over the question now mooted, even if it had been properly raised; their jurisdiction was confined to ascertaining whether a proper defence had been set up to the particular augmentation then in hand, and could not extend to any future augmentation. 2. Because the question of exemption, though raised by the respondents' predecessors, was not decided *in foro contentioso*. Two claims of exemption were set up, 1st, from the payments which had been in use to be made subsequent to 1650; and 2nd, from liability for any further portion of the augmentation. The first only of these questions was contested, and it was decided against the party. With regard to the second, the titles produced in support of it, whether sufficient to sustain an exemption from ultimate liability, were unquestionably sufficient to sustain the claim of exemption from immediate liability. They showed an undoubted heritable right to the teinds, and as there were free teinds in the hands of the titular sufficient to pay the augmentation, which were liable primarily to those in the hands of the heritor, the other heritors had no interest to contest the question of ultimate liability after the free teinds should have been exhausted; and the decree by its terms shows that they did not contest that question. In

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short, the proceeding was confined to liability for the previous use of payments, and nothing was done as to further future payments.

[*Lord Chancellor.*—The decree distinctly assoilzies from all further payment; that was a judgment upon the title.]

Yes, as to the then existing augmentation, which was all that was before the Court; beyond that the judgment was extra-judicial.

[*Lord Chancellor.*—It seems extraordinary that in every successive locality the same question must be decided over and over again.]

All the heritors may not on each occasion be before the Court, but the party may obtain a general and permanent exemption by process of declarator, to which all the heritors must be summoned.

[*Lord Campbell.*—Is there any instance of a declarator of exemption?]

We are not aware that there is; but in no other case than the present has a judgment in a prior locality been held to be *res judicata*. All the authorities negative such a plea, and in some of them, after the point had been deliberately raised and argued,—Auchterlonie *v.* Carmylie, 15 *F. C.* 659; Dickson *v.* Biggar, *Shaw's Teind Cases*, p. 174; Smith *v.* Hunter, *Ibid.*, p. 48; College of Glasgow *v.* Menteith, 17 *F. C.*, 372; Anstruther *v.* Lockhart, *Sh. T. C.*, p. 133; Leslie *v.* Heritors of Rayne, *Mor.* vo. 'Stipend,' App. No. 2; Wemyss *v.* Heritors of Newburn, *Mor. Teind*, App. No. 7; Hay, 15 *F. C.* 564; Hamilton *v.* Paterson, 1 *D.* and *B.*, 453; Maxwell *v.* Jardine, *Sh. T. C.*, p. 13. In some of these cases, on reference to the pleadings, it will be found that the Court, after having in one locality determined the claim upon the titles, has in a subsequent locality again examined the titles, disregarding their previous judgment as having already settled the question; and in the case of Leslie *v.* Rayne, the point of *res judicata* was expressly taken and repelled.

Moreover, at the period of the decree of 1710, and for a long time subsequent, it was a generally received opinion that a second augmentation could not be granted by the Commission, so that the Commissioners could have had in view to decide only what should affect the particular augmentation before them, and the heritors being by the decision freed from liability in regard to it, could not contemplate the necessity of contesting claims of exemption with a view to a subsequent augmentation, which in the then existing notion could never arise.

Lord Advocate and Mr. Anderson, for Respondents.—I. A claim for general exemption from payment of stipend is never tried in any other way than in a process of locality. Though the Commission in its original constitution, not being then composed of lawyers, would not try such questions even when occurring incidentally in a process of locality, as is shown by the case of Monymusk relied on by the appellant, which in this respect proves too much for him; yet ever since the powers of the Commission were transferred to the Court of Session, questions of exemption have constantly been tried in processes of locality. There is nothing in the constitution of the Court as it now exists, or in the form of the particular process, to prevent such questions being properly entertained and determined. All the heritors are summoned for their interest, and they have an obvious interest in any condition of the teinds to support their own claims for exemption or otherwise, and to dispute those set up by others.

II. The claim of exemption was expressly set up, and was contested by the other heritors and for an obvious reason; although there were free teinds, it had not, at the date of the interlocutor sustaining the claim, been ascertained whether these free teinds would be sufficient to defray the augmentation, and on the supposition that they would prove insufficient, the heritors had a clear interest to maintain the liability of the claimant to

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contribute to the deficiency. Being so set up and contested, th claim was disposed of upon the grounds upon which it was s up, by absolvitor from all further payment "in respect of th "writs produced."

[*Lord Chancellor.*—Was not the continuance of the pa ments that had been made up to that time all that was materi in the process?]

It might not, for there had to be an allocation of the stipen which had been carried away by the minister of the newl erected parish of Gladsmuir, the effect of which might be t draw from the claimant a greater payment than he had been i use to make. Not only does the decree in terms dispose of th claim upon the shape of the title, but the case of Dempster Arnott, 2 *Connell*, 380, shows that the judgment was considere by the profession soon afterwards as a leading authority on th effect of such a title.

No authority has been produced to show that a decree in on locality will not form *res judicata* in another; such a decision i not given in any of the cases relied on; in some of them th question did not even arise, and in others it arises only infe rentially, from a comparison of the pleadings with the decree But in the present case the decree was not in a locality alone but in a reduction conjoined with it; it is difficult to conceiv therefore in what case *res judicata* can receive effect if not i such a one.

[*Lord Chancellor.*—The Court found that there was anothe fund for payment. No party, therefore, had an interest to com plain; there could not, therefore, have been an appeal fo instance.]

The effect being prospective, the parties had an interest an could have appealed.

[*Lord Cottenham.*—The case never arose which made it necessary for the Court to consider the liability.]

[*Lord Chancellor.*—If it had been known beforehand that

here was the other fund, would the Court have required to ecide the question of liability?]

No, it would not; but nevertheless it did decide the question fter it had been fully raised.

[*Lord Chancellor.*—Who were the parties interested to appeal ne point decided as to the application of the other teinds?]

The parties having these teinds; but until it was known iat they would acquiesce, the heritors, having heritable rights, ad an interest to dispute the claim of exemption.

[*Lord Chancellor.*—The claim was supposed to be material, ut turned out not to be so; it formed therefore no part of the nal judgment—there could not be an appeal.

Lord Brougham.—The Court of Appeal would not have ecided it one way or the other—they would have said they had othing to do with it.]

If the judgment had been against the claim, the party would ave had a clear right to appeal, and at the time it was pro-ounced the other heritors had a clear right to contest it, though t the result it turned out to be otherwise.

[*Lord Cottenham.*—Suppose the opinion on the right had een the other way, would not the ultimate judgment have been ne same as it was?]

Yes.

[*Lord Cottenham.*—Then the judgment on the right was *itter.*

LORD CHANCELLOR.—My Lords, the view which I take of ne question in this case does not appear to have occurred to ne Court below. There is no doubt the Court had jurisdiction o decide the question for the determination of the case before hem. The right to decide the question, when necessary, was ncidental to the jurisdiction; but in this case it turned out not o be necessary, and the opinion of the Court expressed with egard to it, in the progress of the cause, cannot conclude the

parties, as it formed no part of the final decision, or of t
grounds on which that decision proceeded. It is true th
found that the appellant was bound to pay according to the r
at which he had previously paid, but not any further. They
found, with a view to the ultimate decision of the cause; but
the result it appears to have been unnecessary for the decisi
which proceeded on totally different grounds, and the findi
therefore, became wholly immaterial.

I am of opinion, therefore, that this cannot be considered
judicata, and that the judgment must be reversed.

LORD BROUGHAM.—My Lords, I had not the advantage
hearing the arguments for the appellant, and consequently if
had been disposed to affirm the judgment I should not ha
taken any part in the decision of the appeal. But as, aft
having heard the counsel for the respondents, I entirely agr
with the appellant, that is to say, as my opinion is entir
against the ground of the decision, and against the decision its
I entirely agree with the noble and learned Lord on the Woolsa
who has stated his opinion, that this is not such a decision of t
Court in the suit of 1710 as can be termed a *res judicata;* a
for the reason given by my noble and learned friend, that t
was a matter which, though at that period of the case might ha
worn the appearance of being in point, and material, yet, as wh
the rest of the case came to be considered, and the ultimate de
sion came to be given, it turned out to be beside the point, a
immaterial, the interlocutor must be reversed.

It has been said that there could have been no appeal fr
it. Nor could there have been; for there could be no app
from an immaterial judgment at the conclusion of the cause,
the party prosecuting must have an interest, and no person co
be affected or injured by an immaterial judgment. But I do
whether, at that intermediate period of the cause, in 1710, t
appeal could have been prosecuted to any effectual purpose, beca

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t would be open to the objection, that when it came to be ulti-
nately disposed of, this would be found immaterial. However,
t is sufficient to show, as my noble and learned friend has
atisfactorily shown, that this was not a judgment that was
naterial in that suit, and was not a decision given on a matter
hat was really materially raised before the Court.

It is said at the bar that we are not to take into consider-
ıtion circumstances that afterwards occurred. That is not the
›oint. There was no change of circumstances, there was no
ıew facts; the only circumstance that afterwards occurred was,
hat the case went on to its natural termination, and that then
he judgment, on this point, turned out to be perfectly imma-
erial. That being the case, it becomes unnecessary to dispose of
he second point, which cannot be said properly to arise in this
ase. In fact, we are not called upon to do so, but if your
ordships look to the interlocutor of the Court of Session, it
›ppears that the learned Judges had not taken that view of it
ıt all.

LORD COTTENHAM.—My Lords, I do not find, as far as I can
›ollect from what passed in the Court below, that this view of
he case was considered in the Court of Session. The question
ırgued was, whether what took place in the proceedings in the
ear 1710 precludes the parties from raising the question as to
he liability of these lands. It is said that the Court then
lecided that they were not liable beyond what they had been
ıccustomed to pay, and that the matter which was in question
n those proceedings was not the actual augmentation of the
ninister's stipend; that that had been decreed many years
›efore, namely, in 1650, but the minister said, "It is now ne-
'cessary that I should have decided in what proportions the
'several lands are liable to pay me;" and in the meantime a
›ortion of the parish having been separated, it became necessary
›o indemnify the minister against the loss he had sustained by

losing so much of his stipend as was derived from these land
Then the owner of the lands says, " I am not bound to pay an
" part of the stipend, because I am entitled to the tithes of m
" lands in the right of inheritance." But the answer to th
was, " You have paid for such a length of time;" whether th
was a sufficient ground or not is quite immaterial, " and y
" must continue to pay the same proportion as you have pai
" but there is no question whether you are liable to pay an
" thing beyond what you before paid." If there had been
question before the Court, and calling for a decision as to a pa
ment beyond what had been before paid, no doubt that questi
being raised, any decision upon it would have been *res judica*
but it turned out that nothing more was done than I h
stated, there being a fund of unappropriated teinds which wo
indemnify the minister the moment he suffered by a part of t
original lands having been separated from the parish. Wh
was the result of the cause? The result of the cause was, th
the owner of the land failed, so far as he contended that he ough
not to have paid anything, and the minister never had occasio
to raise the question whether he was liable to pay more, becaus
he was satisfied with the ultimate arrangements adopted
throwing the loss he had sustained upon these unappropriate
teinds.

Now the whole difficulty has arisen from the Court decidi
by anticipation a point which, if the cause had taken anoth
course, would never have been raised at all. If before decidi
whether it was necessary to order the sums payable out of the
lands, they had taken the course of deciding that these unappr
priated teinds were the proper fund to make good the Minister
loss, it would never have been necessary to consider what land
were liable to pay the additional sum, because no additional su
would have had to be paid at all. The interlocutor declares th
they were not liable to pay beyond the sums then fixed, antic
pating a case which never arose. A decision was expresse

which assumes the form of an interlocutor, which becomes in the result immaterial. How can that be considered a judgment? It was no part of the judgment,—it was an opinion expressed by anticipation, which became perfectly immaterial. That interlocutor can never preclude the parties here from the right of proceeding, in order to raise again the question, whether these lands are or are not protected by the title set up.

LORD CAMPBELL.—My Lords, I should entertain little doubt, in a case of this sort, that the plea of *res judicata* would be competent, if the Court of Session, being competent to determine the liability of lands to contribute to the minister's stipend, had at once properly determined the question. That question arising, and being regularly decided, I should think would render unnecessary further adjudication between the same parties: those who were privy to that decision would be bound by what had been decided, and we would have to declare that we found the matter to have been decided. But then in all those cases where *res judicata* is set up as precluding any further inquiry, it must appear that the former judgment was regular, and that the same question properly arose, and was properly decided between the same parties, or parties between whom and the existing litigants, there was a privity. Now, in this case, as soon as I had ascertained, by looking into the proceedings which took place at the commencement of the eighteenth century, that they related to the question whether the lands were liable to pay exactly the same sum to the minister, whether there existed any ulterior liabilities or not, I certainly made up my mind that the question of ulterior liability did not arise, and was not judicially determined. The substantial question there was, as it turned out, whether Bearford should continue to pay what it had paid in the year 1650, when the augmentation was granted, and the time when this suit of locality was commenced, in consequence of part of the lands of Haddington being transferred to Glaids-

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muir. The owner of Bearford said, "No, if this payment has "been without any legal obligation, now there is to be a new "locality, it shall pay nothing." The owners of the other lands said, "Bearford has paid from 1650 downwards, and Bearford "ought to continue to pay what it has before paid;" and it was determined that Bearford should continue to pay what it had before paid. In that case the heritors gained all they asked; they were not aggrieved: the suit was determined in their favour. The owner of Bearford appealed from the judgment of the Lord Ordinary to the Inner House, and the decision was against him in the Inner House. If it had been against him before the Lord Ordinary, then if there had been to have been any appeal, it would have been by him on account of the decree deciding his liability to contribute what he had paid from 1650. But there was no occasion for the heritors to contribute, because, without throwing any additional burden on them or Bearford, the minister's stipend was completely satisfied. The question of ulterior liability did not arise: it was purely an extra judicial opinion with respect to the ulterior liability. That ulterior liability was not judicially decided, and it still remains an open question. How it may be decided it is impossible for us to anticipate. All we say is, that it has not yet been decided, and that that is a question which must now be inquired into, and that the cause must be remitted for that purpose, and of course the interlocutor must be reversed.

Lord Brougham.—The order will be a reversal of the interlocutor on the plea of *res judicata* and *quoad ultra*, remit the cause.

Lord Advocate.—Would your Lordships say that this judgment should apply to the case of the parties who have not appealed?

Lord Brougham.—We can say nothing upon that.

Mr. Kelly.—That is not before the Court.

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Lord Campbell.—That would be extra judicial.

Lord Brougham.—No, no, we cannot do that: if we did, we should be just following the course adopted by the Court below, in 1710.

Interlocutors reversed as to plea of res judicata, *and* quoad ultra *remitted.*

Ordered and Adjudged,—That the interlocutors of the Lord Ordinary and the interlocutor of the Lords of Session of the First Division complained of in the said appeal, so far as they or any of them have the effect of finding that the decreet of locality pronounced on the 8th of February, 1710, or any of the judgments or interlocutors pronounced in the process of locality commenced in the year 1707, constituted *res judicata* as against the appellant in this appeal, and in so far as they find the appellant liable in expences, be and the same are hereby reversed. And it is further ordered, that the said respondents do pay, or cause to be paid to the said appellant the costs of the proceedings incurred by him in the said cause in the Court of Session, so far as relates to the discussion of the said plea of *res judicata*. And it is also further ordered, that *quoad ultra* the cause be remitted to the said first division of the Court of Session in Scotland, to do therein as shall be just.

RICHARDSON and CONNELL—SPOTTISWOODE and ROBERTSON, Agents.

[14th June, 1844.]

EDWARD RAILTON, Writer, in Glasgow, *Appellant.*

THOMAS G. MATTHEWS and ROBERT LEONARD, of the City of Bristol, Drysalters, *Respondents.*

Cautioner—Principal and Surety.—Facts, regarding the conduct or circumstances of an agent, occurring prior to the granting of a Bond of Caution for him, which were known to or might have been ascertained by the creditor, but which were not disclosed to the surety, will vitiate the bond as to the surety without regard to the motive from which the non-communication may have arisen.

PRIOR and up to 1834, Rowley and Hickes were the agents at Glasgow of Messrs. Olives and Matthews, of Bristol, for the sale of their goods there. In the month of February, 183— 4, Rowley and Hickes separated, and each of them applied to be continued in the agency; Rowley enforced his application by representing that in the month of June preceding, Hickes had used the partnership name without his knowledge, by discounting a bill for 350*l.* in favour of a private friend. Olives and Matthews disregarded this representation, and on the 25th of February, 1834, appointed Hickes to be their sole agent. During the agency of Rowley and Hickes, security had not been required from them; but on Hickes alone being made the agent, security was required from him to the amount of 3000*l.* This requisition, though occasionally referred to in the correspondence between the parties, was not enforced until about the month of January, 1835, when a bond in the penalty of 4000*l.* was prepared and executed by Hickes, and the appellant as his surety, but was never completed, another proposed surety refusing to sign it. Whilst this matter was in abeyance a change took place in the firm of Olives and Matthews, which now became that of

Matthews and Leonard. The new firm continued Hickes as their agent, but insisted upon security; in consequence, a new bond in the penalty of 4000*l.* was prepared and executed in the autumn of 1835 by Hickes, and by the appellant, and Henry W. Hickes as his sureties.

This bond, which was in the English form, recited that Matthews and Leonard had admitted Hickes to their service as their clerk and commission agent, and intended to continue him in those characters on his procuring sureties, and expressed the condition in these terms: "Now the condition of the above "written obligation is such, that if the said George Hickes, "shall and do, from time to time and at all times well and "satisfactorily account for and pay over, and deliver to the said "Thomas Gadd Matthews and Robert Leonard, or to the sur- "vivor of them, their or his executors or administrators, and "other the persons or person who shall or may become partners "or partner with them, or any or either of them, or their or "his executors or administrators, all and every sums and sum "of money, and securities for money, goods and effects what- "soever, which he the said George Hickes, shall receive for "their, any or either of their, use, or which shall at any time "or times be entrusted to his care by them the said Thomas "Gadd Matthews and Robert Leonard, or the survivor of them, "their or his executors or administrators, or other the persons "or person who shall or may become partners or partner with "them, or any or either of them, or their or his executors or "administrators, or by their or any or either of their corre- "spondents or customers, or others to whom they, any or either "of them are, or is, or shall, or may be liable or accountable: "and do not at any time embezzle, make away with, obliterate, "deface, or in any wise injure any of the money, securities for "money, books, papers, writings, goods or effects of them the "said Thomas Gadd Matthews and Robert Leonard, or the "survivor of them, their or his executors or administrators, or

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"other the persons or person who shall or may become par-
"ners or partner with them, or any or either of them, or the
"or his executors or administrators, or of their, any or eithe
"of their correspondents or customers, or others to whom the
"or either of them are, or is, or shall, or may be or becom
"liable or accountable: and also, if the said George Hickes d
"and shall in all respects faithfully and honestly demean a
"conduct himself, as the clerk and commission agent of the sa
"Thomas Gadd Matthews and Robert Leonard, or the survivo
"of them, their or his executors or administrators, or other th
"persons or person who shall or may become partners or par-
"ner with them, or any or either of them, or their or his
"executors or administrators: then, and in such case, the above-
"written obligation to be void and of no effect, otherwise to be
"and remain in full force and virtue."

Hickes continued to act as agent until the month of May, 1837. In that month, one of the partners of Matthews and Leonard came to Glasgow, in consequence of the return of a bill by one of the debtors to the firm, and of his own authority took possession of Hickes's books and papers, and of his counting-house and premises, and shortly afterwards applied to the appellant as one of his sureties for payment of a balance owing by him. This not being complied with, Matthews and Leonard raised action upon the bond of surety against the trustee upon the sequestrated estate of Hickes, whom they had made a bankrupt, and the two sureties in the bond for count reckoning and payment of a balance of 4000*l.*

The sureties, among other defences to this action, pleaded specially the following: "The defendants are relieved as *cau-*
"*tioners* under the bond, in respect, 1. That in taking it the
"pursuers improperly concealed from them the misconduct of
"the *principal*, and the extent of the debt due by him under
"his previous agency. 2. That during the currency of the bond,
"and without notice to the defenders, as *cautioners*, the pur-

" suers wrongfully neglected to enforce regular remittances from " the *principal*, and in the course of a period of nineteen months " allowed, as they now allege, a large arrear to accumulate in " his hands, of which it is the object of the action to enforce " payment from the defenders; and 3. That by illegally taking " possession of the whole stock, books, and papers of the *prin-* " *cipal*, the pursuers deprived the cautioners of all fair oppor- " tunity of ascertaining the true state of accounts between them " and their agent."

In support of this defence, the appellant also brought a reduction improbation of the bond, upon the ground that it had been obtained "fraudulently by the said defenders, and in " the procurement thereof they were guilty of a fraudulent con- " cealment of material circumstances known to themselves, and " deeply affecting the credit and trust-worthiness of the said " George Hickes; and that although the said George Hickes, " from the date of the said bond down to the period of his " bankruptcy in May, 1837, continued to go on in a constant " course of irregularities and misconduct, by failing to render " weekly accounts, or to make the remittances that were due; " and although there appeared to be on the face of his accounts, " and transactions, large and increasing balances known to the " defenders, and which drew forth continual complaints from " them, yet they fraudulently concealed the said circumstances " and state of accounts from the pursuer, and gave no notice " thereof to him, and totally failed to make any communication " to him on the subject."

The two actions were conjoined, and subsequently an issue was adjusted and sent to trial in these terms: " It being admitted " that, on the 21st day of September and 10th day of October, " 1835, the bond of caution and surety, No. 3 of process, was " subscribed by the pursuer Edward Railton, George Hickes of " the City of Glasgow, and Henry William Hickes of the City " of Worcester; and it being further admitted that the said

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" George Hickes acted as agent for the defenders, Matthews and " Leonard, from the date of the said bond to the month of May, " 1837.

" Whether the pursuer, Edward Railton, was induced to " subscribe the said bond of caution or surety, by undue conceal- " ment or deception on the part of the defenders, or either of " them."

On the trial of this issue, the facts alleged by the appellant in support of his defence, and of his reduction improbation, were sustained by evidence, but the motive imputed was not proved further than as it might be inferred one way or other from the circumstances.

The Judge, (the Lord Justice Clerk,) in charging the jury upon the evidence, expressed himself in these terms: " One part " of the question is, whether as a matter of fact the pursuer " ' was induced' to subscribe the bond of caution by undue con- " cealment or deception, and they must be satisfied that the " undue concealment or deception was the efficient cause of his " signing the bond. But at the same time this was to be under- " stood and applied by them under this qualification, viz.: that " undue concealment may consist wholly in non-communication. " Hence, if a party under such a duty of communication as he " should afterwards explain, in relation to the position of the " defenders, did not make the disclosures which the jury might " think he ought to have done, of matters which, if communi- " cated, might have prevented the pursuer signing the bond, " then the fact of concealment of what might have led the " pursuer not to sign the bond, may be taken to have induced " him to sign, although the immediate motive of his doing so " was a desire to assist a friend: under this issue the conceal- " ment must be, 1st, of things known to the defenders, or which " they had strong and grave ground to suspect; and 2ndly, the " concealment therefore being undue, must be wilful and inten- " tional, with a view to the advantage they were thereby to

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" receive. And in reference to the plea maintained by the pur-
" suer, viz., that under this issue he is entitled to a verdict if
" there was ignorance on the part of the defenders from neglect
" on their part, in inquiring into and not discovering matters
" which might have been discovered by investigations in Glasgow,
" and that the same consequences must fall on the defenders as
" to the nullity of the bond from ignorance in such circumstances
" as from undue concealment of facts known to them. Such
" was not the principle of law applicable to the case, or admis-
" sible under the terms of the issue;—the issue referred expressly
" to undue concealment, and not to any neglect on the part of
" the defenders to discover what it might be shown they might
" have found out before the date of the bond, but the existence
" of which nothing had led to suspect, if the jury are satisfied
" that nothing had occurred to create suspicion on the part of the
" defenders."

The jury delivered a verdict for the defenders, (the present respondents,) whereupon the appellant tendered a bill of exceptions to the charge of the judge. The Court (on the 31st January, 1844) disallowed the bill of exceptions, discharged a rule to show cause why a new trial should not be granted, and refused to grant such trial.

The appeal was against this interlocutor.

Mr. Serjeant Talfourd and Mr. Fleming for the appellant.—The question at issue upon the exception was, in truth, whether fraud in law was sufficient to vitiate the contract, or whether fraud, in fact, was necessary to work that end. The words of the issue were "undue concealment or deception;" undue concealment, therefore, was used differently from deception, and involved considerations apart from any wicked intention, which was implied in deception; absence of thought or reflection would be undue concealment, though it would not be deception. Interpreting the issue in this way, it is framed in consonance with

the established law of the country. In cases of deception, th[illegible] matter cannot admit of dispute—there fraud is obvious; b[illegible] where deception is wanting, the fact of mere concealment [illegible] sufficient, without reference to the motive from which the co[illegible]=o cealment may have proceeded,—it may have originated possi[illegible] *bl* in a laudable motive, or it may have happened without a[illegible]*ny* motive at all,—from mere inadvertence and want of pro[illegible]*per* reflection,—yet as the consequences are not the less injurious[illegible] *to* the surety, and as his protection is what the law is careful of[illegible] *it* absolves him from his liability in such circumstances if th[illegible]*ere* be fraud in law, which improper concealment is, although th[illegible]*ere* may not have been any moral fraud, or fraud in fact,—that t[illegible]*his* is the law of Scotland is shown by the case of Smith *v.* the Ban[illegible] of Scotland, 1 *Dow.* 272,—a case in many respects analogous to [illegible]*he* present, and in which the remit from this House was to al[illegible]*ow* the party proof whether the bond had been "unduly obtained by "*concealment or deception.*" In that case, no moral imputat[illegible]*on* was set up against *the Bank*, and yet the sureties were absol[illegible]*ed* from liability. The law is the same in England. In Peac[illegible]*ck* *v.* Bishop, 3 *B.* and *Cr.* 605, it was held, that an agreem[illegible]*ent* between a vendor and vendee, whereby the latter was to p[illegible]*ay* 10*s.* per ton above the market price, and the amount of t[illegible] his excess in price was to go in liquidation of an old debt d[illegible]*ue* by the vendee to the vendor was held to be void as against[illegible] a surety for the vendee to whom this speciality was not comm[illegible]*u-* nicated, as being a fraud upon him, the surety being entitled t[illegible] a knowledge of every fact likely to affect his responsibility. So [illegible]*in* Stone *v.* Compton, 5 *Bing. N. Ca.* 142, it was held that[illegible] *a* representation to a surety for a sum about to be advanced [illegible]*on* mortgage, that the whole sum in the mortgage had been paid [illegible]*to* the mortgagor, whereas the actual payment was minus an o[illegible]*ld* debt previously owing by the mortgagor to the mortgag[illegible]*ee,* vitiated the surety's liability.

The same principle was recognised in a case of insuran[illegible]*e,*

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ı, like suretyship, is a contract of indemnity: in Carter *v.*. n, 3 *Burr.*, 1905, Lord Mansfield says, "although the pression should happen through mistake, without any frau- ɜnt intention, yet still the underwriter is deceived and the cy is void; the governing principle is applicable to all tracts and dealings."

r. Kelly and Mr. Anderson for the respondents.—The case ɜ appellant upon the record was one of alleged fraudulent ion; the issue was adjusted from that record, and must be ued with reference to it. The issue is whether the party *induced*," that is by influence used in some way, and the on is continued whether that influence was "undue con- ment or deception." But the plea which he set up by his f exceptions was for a verdict in his favour, if matters of . the respondents were ignorant had been concealed. It is lt to conceive how their innocent ignorance of improper ct by their agent could have operated as any inducement the appellant to become his security. In short, the plea in xceptions is at variance with the record, and the proper ɔonstruction of the terms of the issue.

ɔt only so, but it is opposed to the law, as settled by the

With regard to matters occurring subsequent to the con- n of the contract, all the cases which are collected in *n*, 215, show that the concealment must have been wilful ɪr an object; and with regard to those occurring anterior to ɔntract, Stowe *v.* Compton, 5 *Bing.*, 162, lays down that ıisrepresentation to the surety made with the knowledge ent of the creditor will vitiate the contract, which plainly ɜs that any concealment by accident or mistake, or without ion, could not affect the validity. As to the case of Smith ak of Scotland, that was manifestly decided on the fraud; s proved that the directors had accepted the surety bond ɜ knowledge of large defalcations having previously oc-

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curred, and being at the time unliquidated. Cases of insurance cannot support the doctrine contended for, there there is no intermediate party,—the insured is the party asking the contract, and the insurer can know nothing but from his statement; it is, therefore, obvious that the information communicated must not only be true but full, whereas in suretyship the creditor is asking nothing,—it is the debtor who is benefited, and from whom or the creditor the surety may and ought to make himself acquainted with every particular.

LORD COTTENHAM.—My Lords, this is an appeal from a judgment of the Court below. Entertaining an opinion against the judgment pronounced there, if I had felt any doubt upon the subject, or had considered it a case which required more investigation of the facts than it has received, I certainly should have been unwilling to dispose of it without taking time for further consideration, but the facts are so simple, and the points are so free from doubt, that I see no reason why the House should not at once dispose of the case.

My Lords, the real question is, whether the way in which the learned Judge put this case to the jury, and described to them the duty they had to perform, was or was not consistent with and properly applicable to the question, and the issue raised for their consideration. The issue, in my opinion, very clearly describes the point which the Court wished to have investigated. The terms of the issue must of course be construed as they stand, but it is not immaterial to look to the points raised in the pleadings for the purpose of construction. If there were any doubt upon the meaning of the terms used I would look to the summons for the reduction of the instrument of suretyship, and I find several facts appearing as having passed between the party who was the subject of the suretyship, and those by whom he had been previously employed, and I find the matter stated in these terms, "That the parties totally failed to communicate

" the said circumstances, or either of them, or the existence of " any balance on the agency accounts standing against the said " George Hickes, to the pursuer, or to the said Henry Williams " Hickes; and on the contrary, while they accepted and took " possession of the said bond they fraudulently suppressed and " concealed the said whole facts and circumstances regarding the " conduct and irregularities of the said George Hickes."

There is an imputation made of direct fraud, a fraudulent intention influencing the acts of the parties; and there is a direct statement of concealment.

It has not been contended, and it is impossible to contend, after what Lord Eldon lays down in the case of Smith *v.* The Bank of Scotland, that a case may not exist in which a mere non-communication would invalidate a bond of suretyship. Lord Eldon states various cases in which a party about to become surety would have a right to have communicated to him circumstances within the knowledge of the party acquiring the bond, and he states that it is the duty of the party acquiring the bond to communicate those circumstances, and that the non-communication, or, as he uses the expression, the concealment of those facts would invalidate the obligation and release the surety from the obligation into which he had entered.

Now, when the issue in this case was tried, such being the points raised between the parties, we have nothing to do with the evidence in the cause or the facts proved, or the conclusion to which the jury might or might not have come, under the circumstances, but with the question whether the charge which was made to them was such a charge as we conceive ought to have been made to them. The issue for their consideration was, as a matter of fact, " whether the pursuer, Edward Railton, was " induced to subscribe the bond of caution or surety by undue " concealment or deception on the part of the defenders, or " either of them," raising these two propositions which were

raised in the pleadings in the cause, either of which, if found in the affirmative, would lead to the conclusion of the cause.

The question, looking at the terms in which the matter was left to the jury, and the mode in which the learned Judge informed the jury they ought to perform their duty, is whether there may not have been a case brought before the jury for their consideration, of improper and undue concealment, which I understand to mean a non-communication of facts which ought to have been communicated, which would lead to the relief of the surety, although the non-communication might not be wilful and intentional, and with a view to the advantage which the party was thereby to receive. That which I find here extracted from the charge of the learned Judge, I understand to be one proposition. The learned Judge lays it down distinctly, that the concealment to be undue must be wilful and intentional, with a view to the advantage they were thereby to receive. In my opinion there may be a case of improper concealment, or non-communication of facts which ought to be communicated, which would affect the situation of the parties, even if it was not wilful and intentional, and with a view to the advantage the parties were to receive; the charge, therefore I conceive was not consistent with the rule of law, I think that it narrowed the question for the consideration of the jury beyond the limits which the rights of the parties required to have submitted to the consideration of the jury.

Without going further into the law which regulates the rights of these parties than that which was stated by Lord Eldon in the case of Smith *v.* The Bank of Scotland, we find that in a judgment of this House, in the case of an appeal from Scotland and therefore one peculiarly valuable in the case now under consideration, that has been declared to be the law. The terms used by the learned Judge in directing the jury having limited the question for their consideration much more than the rule

law would justify, it appears to be quite clear that this case has not been properly tried, that the exceptions were properly taken, and that this House is bound to pronounce such a judgment as ought to have been pronounced by the Court of Session.

LORD CAMPBELL.—My Lords, this case has been very satisfactorily argued on both sides with great brevity, but everything has been urged which could be for the advantage of the clients, or the assistance of your Lordships; and having listened to all which has been urged on both sides very attentively, I, without the smallest hesitation, come to the conclusion that the Bill of Exceptions ought to be allowed, and that there must be a new trial.

The question really is, what is the issue which the Court directed in this case; "whether the pursuer, Edward Railton, "was induced to subscribe the said bond of caution or surety by "undue concealment or deception on the part of the defenders, or "either of them." The material words are "undue concealment "on the part of the defenders." What is the meaning of those words? I apprehend, my Lords, the meaning of those words is, whether Railton was induced to subscribe the bond by the defenders having omitted to divulge facts within their knowledge, which they were bound, in point of law, to divulge. If there were facts within their knowledge, which they were, in point of law, bound to divulge, and which they did not divulge, the surety is not bound by the bond: there are plenty of decisions to that effect, both in the law of Scotland and the law of England. If the defenders had facts within their knowledge which it was material the surety should be acquainted with, and which the defenders did not disclose, in my opinion the concealment of those facts—the undue concealment of those facts—discharges the surety; and whether they concealed those facts from one motive or another, I apprehend, is wholly immaterial. It certainly is wholly immaterial to the interest of the

surety, because, to say that his obligation shall depend upon thi which was passing in the mind of the party requiring the bon appears to me preposterous, for that would make the obligatio of the surety depend on whether the other party had a goo memory, or whether he was a person of good sense, or whether h had the facts at the moment in his mind, or whether he was awa that those facts ought to be disclosed. My Lords, the liability o a surety must depend upon the situation in which he is place upon the knowledge which is communicated to him of the fac of the case, and not upon what was passing in the mind of th other party, or the motive of the other party. If the facts wer such as ought to have been communicated,—if it was material t the surety that they should be communicated, the motive fo withholding them, I apprehend, is wholly immaterial,

Then we come to the direction given by the learned Judg The learned Judge says, "The concealment, therefore, bein "undue, must be wilful and intentional, with a view (that i "with reference to the motive) to the advantage they wer "thereby to receive." Now, according to my notion of th issue, that is an entire misconception of it. According to th direction, although the parties acquiring the bond had be aware of the most material facts, which it was their duty disclose, and the withholding of which would avoid the bond, they did not wilfully and intentionally withhold them—that to say, if they had forgotten them, or if they thought, by mis take, that, in point of law or morality, they were not bound disclose them; then, according to the holding of the learn Judge, it would not be concealment. But the learned Jud does not stop there, but he goes on "with a view to the adva "tage they were thereby to receive," introducing those wor conjunctively, and in effect saying that it was not an undue co cealment, unless they had their own particular advantage view. That appears to me a misconception. I will suppo that their motive was kindness to Hickes to keep back from the

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who it was material to him should continue to have a good opinion of him, the knowledge of those facts, that it was from pure kindness on their part to prevent those parties entertaining a bad opinion of him, and not from any selfishness this concealment took place. Although that might be the motive, yet the fact that he was in arrear, and had been guilty of fraudulent conduct, and that he was a defaulter, were facts which it was most material for the surety to be acquainted with. If these were held back, merely from a kind motive to Hickes, and not at all from any selfish motive on the part of those to whom the bond was to be executed, the effect, in point of law, would be the same as if the motive were merely the personal benefit of the parties to receive the bond. It appears to me, therefore, that the learned Judge has misunderstood the meaning of the issue, and that having told the jury that a concealment to be undue must be wilful and intentional, with a view to the advantage which the parties were thereby to receive, that was a mis-direction, and that it had a tendency to mislead the jury; that it was wrong in point of law, and that the exception to that direction ought to be allowed.

Ordered and adjudged, That the Interlocutors complained of in the appeal be reversed; and it is further ordered and adjudged, that the bill of exceptions referred to in the said Interlocutor of the 31st of January, 1844, be allowed, and that a new trial be granted; and it is also further ordered, that the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

G. PARSONS—DEANS, DUNLOP and HOPE, Agents.

[Heard 21*st July*, 1842. Judgment, 4*th September*, 1844.]

RIGHT HON. JAMES ALEXANDER, EARL OF ROSSLYN, and JOHN DUNDAS, ESQ., *Appellants*.

ROGER AYTOUN, ESQ., Director of Chancery, *Respondent*.

Public Officer.—A public officer holding his appointment for life, with power to appoint a subordinate officer, may validly make the appointment of such subordinate officer for life, though the appointment may thereby extend beyond his own life.

Ibid.—It is not competent for a public officer having power to appoint a subordinate officer for life, to make such appointment to two or more persons for their joint lives, with benefit of survivorship, there not being any usage to support such an appointment.

IN 1756 a commission was issued under the Great Seal, giving
" Davidi Scott de Scotstarvit Armigero, pro et durantibus on
" nibus suæ vitæ diebus, et post ejus decessum dicto Davi di
" Scott filio suo natu maximo pro et durantibus omnibus su æ
" vitæ diebus, prænominatum Officium Directoris nostræ Ca n-
" cellariæ in Scotia, cum omnibus privilegiis feodis profic is
" casualitatibus et emolumentis quibuscunq. ad idem spect n-
" tibus, vel quæ ad idem pertinere et spectare dignoscunt r.
" Cum plena et ampla potestate memorato Davidi Scott, seni i,
" durante ejus vita et post ejus decessum dicto Davidi Sco t,
" juniori, durante ejus vita per semetipsos eorumque deputa os
" substitutos et servos (quos nos potestatem illis nomina di
" damus et pro quibus respondere tenebuntur), dicto Offi io
" Directoris nostræ Cancellariæ in Scotia, utendi et potiu di
" tam libere in omnibus respectibus quam ullus alius Direc or
" ejus eodem ullo tempore præterito usus et potitus fuerat, cu m
" omnibus honoribus privilegiis dignitatibus et immunitati us
" quibuscunq. quibus ullus Director nostræ Cancellariæ in Sco tia
" temporibus retroactis politi fuerunt vel possesserunt."

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the 17th of January, 1780, another commission was which, reciting the previous one in favour of the Scotts, ne royal intention to give the reversion of the office of or of Chancery to Sir James Erskine, granted him the "una cum omnibus feodis, salariis casualitatibus proficuis molumentis eidem pertinen et cum omnibus talibus po-itibus et privilegiis et in tam pleno et amplo modo omnibus ntis et propositis quam dictus Davidi Scott nunc tenet vel re debit et frui eod."

1787, Sir James Erskine, now Lord Rosslyn, being in sion of the office, gave Bethune the appointment of Clerk ancery for life, in consideration of a sum of money paid

On Bethune's death in 1807, his Lordship gave the itment to his brother John Erskine, who held it until his in 1817. The appointment was then given to Ralph as for his life, which terminated in 1824, when Lord n appointed his son Henry St. Clair Erskine and John as "jointly and severally *during their respective lives, and survivor of them*, to be sole writers and clerks, or writer clerk under me and my deputy in the said office of his esty's Chancery in Scotland, with full power to the said ry Francis St. Clair Erskine, and John Dundas, jointly severally, and to the survivor of them, by themselves, or survivor of them or by others whom they or he may loy as assistants or servants, for whom they shall be werable to me or my deputy, of exclusively writing, tran-bing, and extending all charters, &c., and in general of ying and exercising the said office of writers and clerks, or ter and clerk, of the said Chancery, *during their joint lives the life of the survivor of them*, with all the privileges, rties, and immunities belonging thereto, as fully and freely, with every other power as hitherto known to belong to the ce of writer and clerk of Chancery, or that any of their decessors ever enjoyed or exercised."

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Henry St. Clair died in 1829, and Lord Rosslyn then gave a new appointment to the appellants, the terms of which appear from the summons noticed below, to have been the same as those in the appointment of 1824 just quoted.

In 1817 the Act of the 57th George III., cap. 64, passed. By the 11th section of this Act, it is enacted, "That from and "after, and upon the termination respectively of the then exist- "ing interests in the several offices therein specified, and par- "ticularly in the said offices of Director of Chancery in Scotland, "and Clerk of the Chancery in Scotland, and so soon as the "said offices, or either of them, shall become vacant, the duties "shall be discharged by the officer appointed to hold the same in "person; and from time to time, as any of the said respective "offices shall become vacant, it shall be lawful for the said Lord "High Treasurer, or Commissioners of the Treasury, or any "three or more of them for the time being, and they are hereby "authorized and required to regulate the duties and establish- "ments of the said offices respectively, as they respectively "become vacant, so as that the several duties to be discharged "therein respectively shall be performed in person; and there- "upon and thereafter, such, and such number of fit and proper "persons shall be appointed, or shall be authorized and directed "to be appointed, as may be sufficient and necessary to perform "and execute the duties to be done, performed, and executed in "the said offices respectively, as the said commissioners shall "deem fit, with such salaries or allowances as shall be ordered "or appointed by the said Lord High Treasurer or Commis- "sioners of the Treasury in that behalf, regard being had in "every such case to the nature and extent of the duties to be "performed, and to the responsibility which may attach or "belong to the several and respective officers or persons exe- "cuting the duties of the said offices respectively; and all such "regulations, appointments, salaries, and allowances, when so "made and established, shall become and be in full force and

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" effect in relation to the said offices respectively, anything con-
" tained in any Act or Acts of Parliament, or any law or laws,
" or usage, custom, or practice to the contrary notwithstanding:
" provided always, that any fees at present charged or chargeable
" for, or in respect of, any of the said offices respectively, shall
" continue to be received, and the same shall be applied in the
" payment of the salary or salaries, allowance or allowances,
" authorized by this Act to be granted or made in each of the
" said offices in which such fees shall be received; and if any
" balance of such fees shall remain, after paying and satisfying
" such salaries or allowances respectively, the same shall be paid,
" at least once in three months, to the receiver-general of Scot-
" land, and shall by him be paid and accounted for in the same
" manner with any public monies received and accounted for by
" him."

In January, 1837, James Earl of Rosslyn died. On the 11th of April in that year the Lords of the Treasury proceeded to exercise the powers given them by the statute, by declaring that the office of director and of clerk should be executed by one and the same person, and in consequence the respondent received a commission on the 1st of May, 1837, appointing him to the joint offices with a fixed salary.

In October, 1837, the respondent raised an action against the appellants, the summons in which set forth " That the said James
" Earl of Rosslyn had no right, title, or power to make or exe-
" cute any grant or commission to any deputies, substitutes, or
" other servants, and more particularly any grant or commission
" of the office of clerk, or of writer and clerk in chancery, to
" endure for any term extending beyond that of his own enjoy-
" ment and possession of the said office of Director of Chancery—
" or, at all events, for any term extending beyond that of his own
" natural life; and still more especially, and even during his
" own life, and possession of the said office of director, he had no
" right, title, or power to grant any commission, deputation, sub-

" stitution, or other delegation to and in favour of two or more " persons jointly with survivorship to the longest heir.

" That, notwithstanding, James Earl of Rosslyn had appointed " James Alexander Lord Loughborough, now Earl of Rosslyn, " and John Dundas, jointly and severally, during their respective " lives, and the survivor of them, to be sole writers and clerks, " or writer and clerk of chancery, in Scotland, under him and " his deputy, with full power to the said James Alexander " Lord Loughborough, Earl of Rosslyn, and John Dundas, " jointly and severally, and to the survivor of them, by them- " selves or the survivor of them, or by others whom they or " he might employ as assistants or servants, for whom they " should be answerable to the said Earl or his deputy, of exclu- " sively writing," &c., and generally of executing all the duties of the office, " during their joint lives, and the life of the survivor of " them."

The summons further set forth, that the commission to the appellants came to an end by the death of James Earl of Rosslyn, and thereafter the office of Clerk in Chancery became united in the person of the respondent with that of Director of Chancery.

The summons concluded, that it should be declared that James Earl of Rosslyn had " no power to grant any commis- " sion, deputation, substitution, or other delegation whatsoever, " of the office of clerk, or of writer and clerk in chancery afore- " said, to endure beyond the period of his own natural life; and " more especially, and even during his life, had no power to " grant any such commission, deputation, substitution, or other " delegation, to and in favour of two or more persons jointly, " with survivorship to the longest liver;" and that the commis- sion to the appellants should be reduced and declared void as *ultra vires* of the granter, or, at all events, it should be found that the office held by the respondents, under the commission of James Earl of Rosslyn, expired upon his Lordship's death, and that the respondent had thenceforth a good and undoubted right

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to exercise the office. There were then consequential conclusions in regard to the fees of the office which had been drawn by the appellants.

The appellants, in defence, stated, that from the earliest period the appointment of the Clerk in Chancery had been one of the most important privileges attached to the office of the Director of Chancery; that the patronage had been exercised without control; that the appointments had been for life, and upon such arrangements as the parties could agree upon.

The pleas in law stated by the respondent, in support of his action, were,—

1st. The commission in favour of the defenders contained words of limitation, according to which it did not endure for any longer period than the Earl himself and his deputy continued to hold the office of director, the commission appointing the defenders, during their respective lives, and the survivor of them, to be "writers and clerks under me and my deputy, in the said "office of his Majesty's Chancery in Scotland," and making them "answerable to me and my deputy" for the assistants or servants to be employed by them.

2nd. Such commissions, in so far as it is argued to be a commission in favour of the defenders for their joint lives, or the life of the survivor, irrespective of the principal's tenure of office, would have been, and is, at common law, and in reference to the terms of his own commission as well as otherwise, *ultra vires* of the Earl.

3rd. Further, in any sense, it was contrary to the provisions of the statute 57th Geo. III. cap. 64, the commission having been granted subsequently to the Act.

4th. The said commission, with all rights, powers, and privileges thereby conferred upon the defenders, or either of them, fell on the decease of the Earl.

5th. The pursuer, by virtue of his commission from the Crown, is now the only true and undoubted Clerk of Chancery, to the exclusion of the defenders and all others.

6th. The defenders are liable in repetition of all sums

uplifted and levied by them, in their pretended capacity of Clerks of Chancery, since the death of the said Earl.

7th. Generally, the pursuer is entitled, in the circumstances of the case, to decree, in all points, in terms of the libel.

The appellants, on the other hand, pleaded,—

1st. At common law, and independently of the provisions of the statute 57 Geo. III., the commission in favour of the defenders is not reducible, inasmuch as the late Lord Rosslyn did not exceed his powers as Director of the Chancery, in granting a joint appointment to them during their respective lives.

2nd. As all existing interests were expressly reserved by the statute 57 Geo. III., the power of the late Lord Rosslyn to name clerks was not affected by its provisions. At the date of the defenders' commission, his Lordship, in virtue of the reservations in that statute, was as fully empowered to grant it, as if the statute had not then been passed.

Cases were lodged for the parties which were reported by the Lord Ordinary to the Inner House, and on advising these papers, the Court required the opinions of the other judges.

These opinions were given at great length, and will be found in 3 *D. B.* and *M.*, 740, N. S.

On the 14th March, 1841, the Court (First Division) pronounced the following interlocutor:—"The Lords having advised "the mutual cases for the parties, together with the opinions of the "consulted judges, find, in terms of the first conclusion of the libel, "that the commission made and granted by the deceased James "Earl of Rosslyn, in favour of the said James Alexander Earl of "Rosslyn, and John Dundas, as joint writers and clerks in "chancery is void and null, and reduce, rescind, decern, and "declare the same to have been from the death of the said "James Earl of Rosslyn, void and null as aforesaid; and, with "respect to the remaining points of the case, of consent of "parties, recall the interlocutor of 26th June, 1840, in so far as "it resolved to take the opinions of the Judges of the Second "Division, and of the permanent Lords Ordinary on the whole

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" cause, and appoint parties to prepare short minutes of debate " to the said remaining points of the case, to be interchanged " by the first Box-day, and revised and boxed by the third " Sederunt day in May next."

The appeal was against this Interlocutor.

Mr. Attorney and *Mr. Solicitor-General* for Appellants.—I. The offices of Director and of Clerk of Chancery were, from a remote period, quite distinct, that is recognized by the 57 Geo. III., cap. 64. The director was appointed by commission from the Crown, while the clerk was appointed by commission from the director himself, who in exercising this patronage appears to have done it either gratuitously or for an onerous consideration, either in a price paid down or in receiving a proportion of the fees. The commission of the office of director was in several instances to two for their joint lives, with survivorship. And on the other hand, the commissions granted by the director, in several instances prior to 1787, when the Earl of Rosslyn was appointed director, were for the life of the grantee. In this there was no inconsistency, as the director himself held his office for life, and the two offices were quite separate, the one officer was not the mere deputy of the other; accordingly, in offices of a similar kind, such as Clerk of Session, Clerk of the Bills, Clerk of Justiciary, Lyon Clerk, and Admiralty Clerk, the grant of the office is for life, and in many instances to two for their joint lives. As to many of these offices, the power of appointment rests on usage merely, whereas express power is given to the Director of Chancery, by his commission, to appoint a clerk with the usual powers. If any doubt could be entertained as to the extent of this express power it is cured by the proof of the usage, and moreover is supported by the decision in Hogg *v.* Kerr, *Mor.* 13,106, where the Court refused to remove Hogg on a charge of malversation, and confirmed him in the tenure of his office, according to the grant of it, which was for life; and in Smith *v.* Kerr, the legality of the appointment, which was also

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for life, was inferentially sustained, as otherwise all the other discussion which took place, and upon which the case was in terms decided, would have been superfluous. These cases are supported by others, in regard to similar offices. In Waddell *v.* Inglis, *Mor.* 13,134, a conjunct appointment for life to the office of deputy clerk in the Bill Chamber was sustained against a subsequent principal clerk, although the principal was liable for the acts of the deputy.

[*Lord Campbell.*—The validity of the joint appointment did not arise in that case.]

Objection was not taken to it, nor suggested, by the Court, which is material, as showing that none was considered to exist.

[*Lord Chancellor.*—Nothing is said in the opinions as to the appointment being joint. What is there to confine it to *two*,—if it be valid, what is there to hinder it being made to three or more?]

Every thing is to receive a reasonable construction,—when that case comes before the House it will deal with it,—but a joint appointment to two is supported by the old case Archbishop of Glasgow *v.* Commissary Clerks of Peebles, *Dict. Supp.*, vol. iii., p. 158, where a joint appointment was expressly sustained after objection taken.

II. Assuming the grant of the office to be valid in other respects, it is not affected by the 57 Geo. III., cap. 64. All "present existing interests" are expressly saved, and this power of appointing a clerk was as much an existing interest in the office of director, as that of drawing the fees of the office, or any other advantage appertaining to it.

Mr. Pemberton Leigh and *Mr. Aytoun*, for the Respondents, cited Tarbet *v.* Oliphant, *Mor.* 13,115.

LORD BROUGHAM.—My Lords, in this case my noble and learned friend is about to move an affirmance of the Interlocutor, for reasons which he is about to assign. I differ from the Court below, in the body of their argument, and I find one point

insuperable, that the power has not been executed legally, that two lives have been put in without authority, and therefore, though reluctantly, I agree in the affirmance of this judgment.

LORD CAMPBELL.—My Lords, I am of opinion that this judgment ought to be affirmed.

I entertain no doubt, however, of there being a separate independent office of Clerk of the Chancery. The existence of such an office does not appear from the commissions to the Director of Chancery, and the express power given to him to appoint deputies and servants in his office, for whom he shall be answerable, must rather be taken to apply to the duties of the office of director than to the duties of the office of clerk. The latter office, like others of the same sort, probably took its origin from the appointment of an assistant to do part of the duties, the principal gradually becoming a sinecurist, and the substitute exacting a fee for his own trouble, in addition to those collected for the principal. But as early as the year 1677 there had grown up the office of Clerk of the Chancery, to which William Hogg was appointed, "during all the days of his lifetime, with "all fees pertaining thereto, sicklike as any of his predecessors "had bruiked and joysed the same."

As to this point the statute libelled on is quite conclusive, for it recites the office of Clerk of the Chancery as an office to be regulated in the same manner as the office of Director of the Chancery, and therefore we are not at liberty to consider the person appointed to act as clerk as a mere agent of the director, doing the duties of the director, and necessarily ceasing to have any interest or authority at the death of the director.

We are next to inquire as to the tenure of this office, and I am of opinion that the director had the power of granting it during the life of the grantee. There is not the slightest foundation for the argument, either on principle or according to analogy, that the director holding for life could not confer an interest in

the subordinate office beyond his own life. Many instances might be enumerated of a person holding an office only during pleasure being able in point of law to grant a freehold in another office. We are to look to the manner in which this office of Clerk of the Chancery has been granted and enjoyed, and the precedents of appointments to it for life, with possession under these appointments, and judicial recognition of their validity are, in my opinion, abundant evidence to show that the director, before the passing of the Act of 57 Geo. III., chap. 64, had authority to appoint a person to the office of Clerk of the Chancery for life, and that the person so appointed would have been entitled to hold the office after the death of the director who appointed him.

Nevertheless, I am of opinion that the appointment by the late Earl of Rosslyn, bearing date 29th July, 1830, of James Alexander Lord Loughborough, and John Dundas, and the survivor of them, to be Clerks of Chancery, was *ultra vires* and is now liable to reduction.

In the first place, I concur in the opinion so ably expressed by Lord Moncrieff, that after the passing of the Act of 57 Geo. III., chap. 64, a vacancy having happened in the office of Clerk of the Chancery, the right of the Treasury to regulate it accrued, and consequently the antecedent right of the director to appoint to it was gone. It must not now be forgotten that the statute treats the two offices of director and clerk as quite distinct, and enacts, "that upon the termination respectively of the then "existing interests in these offices, and so soon as the said offices "or any or either of them shall become vacant, it shall be lawful "to regulate the said offices respectively as they respectively "become vacant, any law, usage, custom, or practice to the "contrary notwithstanding."

The appellants rely altogether on the words, "upon the ter-"mination respectively of the present existing interest in the "said offices," and they say that although before the appoint-

ment in question a vacancy had happened in the office of clerk, the interests existing in this office when the Act passed had not terminated. And we are to say whether any interests in the office of clerk, which can fairly be supposed to have been in the contemplation of the legislature, continued.

Now it is plain, that the appellants had no interest in the office when the Act passed. It was then held by James Dundas, who is since dead, and both the appellants have been subsequently appointed.

Looking to the object and language of the statute, I cannot bring my mind to think that the right of appointing *to* the office was an interest *in* the office, which was to prevent the power of regulating it, after successive vacancies, during the lifetime of the then director, and until after the death of a young man of twenty-one, whom on his death-bed he might appoint to the office of clerk. This was an office which the legislature thought required regulation, as soon as possible, for the public good. I cannot think that the right of the holder of one office to appoint to another office was an interest in the latter office, which the legislature intended should defer the correction of the abuses which had sprung up in it.

It has been strongly urged upon us that some meaning must be given to the words "*existing interests*," and that they mean something beyond the mere occurrence of a vacancy. I think they are abundantly satisfied by regarding the interests in the different enumerated offices, which might exist under settlements, the offices being held in trust (as was often the case), or which might exist by grants in reversion, which were not uncommon. Under such circumstances, there were existing interests *in* the office, which were protected after a vacancy, on the resignation or death of the existing officer. But the right of patronage I cannot think was an interest in the office to be disposed of. It might, with more plausibility, be considered an interest in the office to which the patronage was annexed, but

the counsel for the appellants hardly ventured so to argue i and I conceive that to be a bar to the regulation of the office, must be an interest in that office which becomes vacant, and to be regulated. But observe how the object of the legislatu may be effectually defeated by the construction contended f Suppose there were two offices which reciprocally appointed each other, neither could ever be regulated to the end of tim unless by a rare accident both should become vacant at the san moment. But with regard to these two offices, the clerk cc lecting fees for the director, and receiving a boon from him, has an interest in the office of director, if the director has interest in the office of clerk, and the regulation of both offi may be indefinitely postponed.

If the office of clerk had not been saleable, I think th would have been no ground for saying that the patronage w to be preserved to the director; and I do not think that on construction of the statute is to be adopted where the office i not saleable, and another where it is saleable. In the recent Ac of Parliament for abolishing the equity jurisdiction of the Cour of Exchequer, the Lord Chief Baron was deprived, without com pensation, of the valuable patronage of appointing masters o the equity side; and I am not aware of there being anythin abhorrent to reason or justice in saying, that while it is for th public good that offices should exist, the holder of a particul office shall have the appointment to them, but then when th public good requires the abolition of these offices they may b abolished without compensation being made for the patronage them. Whatever injustice might be done by withholding com pensation in this case, if we see clearly that the right to regula the office accrued on the death of James Dundas, we are boun to put this construction upon it, although the value of the offi of director was thereby impaired.

But, independently of the statute, I am of opinion, that th joint appointment of the appellants, with benefit of survivorshi

was *ultra vires* of the director. This objection is distinctly made by the summons, and by one of the pleas of law. It is strongly relied upon in the case of the pursuers below, and ably treated by several of the judges. There is no ground, therefore, for the suggestion that it is a mere after thought, resorted to when the real grounds of the action had failed.

Now, it is incumbent on the appellants to show a right to appoint two to the office, with benefit of survivorship, either, first, by showing that this office has been so disposed of, or, secondly, by showing that, by the law of Scotland, the office may be so disposed of, though never so disposed of before.

First, no joint appointment is shown until the year 1826, after the statute, when Henry Francis St. Clair Erskine and John Dundas were appointed during their joint lives, and the life of the survivor of them. It is said that, as there is no register for the commissions to the clerks, we may presume that there were previous appointments of the same nature. But in the absence of a general law, authorizing joint appointments, I consider it quite clear that the onus lies upon the appellants to prove, by positive evidence, that in former instances this office has been so granted and enjoyed; and the prior appointments being of a single person during his own life, we are bound to believe that, till the year 1826, there had been no joint appointment.

Secondly, the question then arises whether, by the general law of Scotland, such an office, though hitherto granted only to one person for his own life, may be lawfully granted to two and the survivor of them. This would be a very extraordinary law, and would require to be established by clear authority. There is certainly nothing resembling it in England. By usage, the very valuable office of Chief Clerk in the King's Bench might be, and always was, granted to two and the survivor of them, and therefore might be lawfully so granted; but the office of a prothonotary in the Common Pleas and other offices, which till lately were saleable in our courts of justice, which had been sold

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and granted to one person during his life it is quite certai could not have been sold as against a succeeding Chief Justice t two and the survivor of them.

To make out the general law in Scotland usage with respe to other offices is relied upon. The offices cited are generall of a different nature, or there are words in the commission c the principal to authorize the joint appointment. But the offices were of the same nature, I utterly deny the in ference that, because there may have been joint appointments some, there may have been joint appointments to others, whi have been always hitherto held by a single individual. Could t right to appoint jointly to the office of Custos Brevium inferred from the practice to appoint jointly to the office of cl clerk in the Court of King's Bench? It might as well be sa that this office might have been granted for the first time t Lord Rosslyn in reversion, in the year 1826, because simila offices had been granted in reversion.

The authority mainly relied upon to show that by the general law of Scotland, such appointments are universally lawful, is Waddell *v.* Inglis. But, when properly examined, it seems to me to have no application to this case. There Inglis got a appointment for life as Depute Clerk of the Bills from Si Alexander and Sir Philip Anstruther, joint clerks, and hi appointment was *warranted* by both. Yet it was attempted b Waddell to turn out Inglis during the life of one of the An truthers, and an action was brought to that effect. That actio was opposed by Sir Robert Anstruther; and Inglis objected tha the person challenging his right had no title to remove him being but one of two joint tenants to the clerkship. In thes circumstances, the House of Lords held that Waddell had n right to turn him out. The question as to the effect of Ingli being appointed jointly with another did not arise between thes parties, and could not be decided. There is, therefore, no groun for saying that this House has ever given its sanction to th doctrine contended for.

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In the absence of any authority in the law of Scotland, that two may be appointed to an office with benefit of survivorship, to which only one had been appointed for life, we must consider that ten might as well have been appointed, with benefit of survivorship, as two; and that, besides the injustice to the successors to the office in which the right of appointing is vested, there must be great danger that the duties of the office to which the appointment is made may not be adequately performed.

I most sincerely regret that the decision of the Court of Session should cause any loss or disappointment to the family of a most honourable, disinterested, and distinguished statesman, whose talents and virtues conferred great benefits on his country, and endeared him to all who had the advantage of knowing him in private life; but in the faithful discharge of my judicial duty, I feel bound to declare that, in my opinion, the Interlocutor of the majority of the Judges against those whom he appointed to this office, is correct, and ought to be affirmed.

I must observe, that we cannot be influenced by the consideration that the Treasury might sooner have interposed. The rights of the public may be enforced, even if they had been for a time neglected. But in this case it is to be remembered that, till there was a vacancy in the office of director, there must have been great difficulty in regulating the office of clerk. The object seems to have been to consolidate the two offices by the appointment of one officer, who was to do the whole of the duty at an adequate fixed salary, and this could not have been sooner accomplished.

For these reasons, I move your Lordships that the Interlocutors appealed against be affirmed.

LORD CHANCELLOR.—My Lords, this case has been a long time depending for consideration, and I have frequently directed my attention to it. I have never been able to get over the difficulty arising from the joint appointment; and I feel myself bound,

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therefore, though reluctantly, to support the motion of my noble and learned friend.

Mr. Robertson.—I presume that no costs are given in the present case. I understand that the costs of the respondent were defrayed by the Lord Advocate of Scotland, on behalf of the Crown,—in fact, the whole prosecution was at the suit of the Crown; and as no costs are taken or given by the Crown, I presume that no costs are given upon this appeal.

Lord Campbell.—Is the Crown a party?

Mr. Robertson.—I do not know that the Crown is a party, but it was certainly communicated to me that the Lord Advocate paid the costs of this appeal on the part of the respondent.

Lord Campbell.—I should advise your Lordships not to give costs.

Lord Chancellor.—No costs. We have considered this case with great attention, because it is a question of very great importance.

Interlocutor affirmed.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the Interlocutor therein complained of be affirmed; and that with this affirmance the cause be remitted back to the First Division of the Court of Session in Scotland, to do further therein as may be necessary and just.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL, Agents.

[Heard 14*th March*, 1843. Judgment, 4*th September*, 1844.]

MESSRS. JOHN AND ANDREW R. DRUMMOND, Bankers, London, *Appellants.*

MRS. CATHERINE ROSS OF CROMARTY, AND HUGH ROSS, Esq., her Husband, *Respondents.*

Tailzie.—Where an open account is subsisting between parties and an heir of entail in possession under an entail which is not put upon record until at an advanced period of the account, the right of these parties to attach the entailed lands for payment of the balance upon the account is limited to the amount of the balance upon the day on which the entail was put upon record.

Compensation and Retention.—Crown Debt.—The balance upon an open running account between an heir in possession under an entail, and third parties appearing as on the day upon which the entail was put upon record:—*held*, to extinguish a separate and distinct debt, to the effect of barring the third parties from affecting the entailed lands for an ulterior balance subsequent to the recording of the entail, and this although the balance on the particular day was composed of money received on behalf of the Crown.

IN 1783 George Ross executed an entail of his lands of Cromarty, under which his nephew, Alexander Ross, was the first heir who took. This entail did not contain any obligation upon the heirs to record it, and it remained unrecorded throughout the life of the maker.

In 1786 George Ross died, leaving a will providing for payment of his debts, and specially directing his trustees and executors to pay off a large debt secured on the lands of Cromarty and to record the entail. Upon his death, Alexander Ross made up titles, and entered into possession under the entail.

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On 27th May, 1803, and not till then, the entail was put upon record, on the application of a remote substitute.

Alexander Ross was partner in the house of Ross and Ogilvie, extensive Army Agents in London. In the course of their business, the firm had dealings with Messrs. Drummond, as their bankers upon an open account. Drummonds from time to time made Ross and Ogilvie considerable advances of money. In particular on the 26th January, 1796, they lent them 9000*l.*, and obtained from them the following document:—"Borrowed and "received of Messrs. Robert and Andrew Drummond the sum o "9000*l.*, which we hereby promise to repay them or their orde "upon demand, with interest; and as a collateral security fo "the repayment of the same, we have already deposited in thei "hands 93 commercial Exchequer bills of 100*l.* each, dated the "11th day of August, 1795, which they are at liberty to dis- "pose of and repay themselves, the principal and interest of this "note, in case of our failure to do so when required by them."

On the 20th day of August, 1796, upon which day the balance upon the general account was in favour of Ross and Ogilvie, to the extent of 43,936*l.*, that firm paid Drummonds 6000*l.* to account of the note, and the payment was marked upon the back of the note, and the securities to that extent were delivered up.

On the 25th June, 1796, Drummonds also advanced 5000*l.* and received the joint and several bond of the individual partners of Ross and Ogilvie, and the deposit of a bond by Lord Dundas for 5000*l.* And on 26th March, 1798, they made a still further advance of 10,000*l.*, and received Ross and Ogilvie's promissory note, payable two months after date, with interest, and the deposit as a collateral security of bonds by third parties, for 10,559*l.*

These advances were made by their respective amounts being placed to the credit of Ross and Ogilvie in the general account giving them thereby the power of operating upon the account to

that extent, as their occasions might require. No entry was made on the opposite or debit side of the account of the promissory notes and bonds; these were kept by Drummonds among their securities, and dealt with accordingly; interest on the amounts was however from time to time charged in the general account, and allowed. Until December, 1803, these charges were made, altogether irrespective of the state of the balance, on the general account, whether as being in favour of Messrs. Drummond or against them.

In the course of their business, Ross and Ogilvie were in the habit of receiving cheques from the War Office upon the Bank of England, for the pay of the different regiments for which they were agents. These cheques they usually handed over to Drummonds, who drew the money from the bank, and then placed the amount to the credit of Ross and Ogilvie in the general account.

Ross and Ogilvie continued their business until March, 1804, in which month a commission of bankruptcy was issued against them. Drummonds made a claim under the commission for a debt of 32,158*l.*, but without proving for the amount. While the commission was under prosecution, Drummonds took steps for attaching Ross's real estate of Cromarty as a means for their payment. For this purpose they brought into play the promissory notes and bond for the three several sums of 9000*l.*, 5000*l.*, and 10,000*l.*, which they had obtained in 1796 and 1798; and ultimately, on the 17th February, 1808, they succeeded in obtaining a decree of constitution in absence against Alexander Ross, against whom alone the action was directed, and finally a decree of adjudication of the lands of Cromarty, for payment of the above three sums, minus the 6000*l.*, which had been paid to account of the 9000*l.*, upon the ground that as the debts had been contracted prior to the entail of Cromarty having been put upon record, the lands were liable for them in the same way as for an entailer's debts.

Alexander Ross died in 1820, and the respondent Mrs. Ross

then became the substitute heir entitled to take under the entail. Between her and Messrs. Drummonds a variety of legal proceedings took place, which, for the purposes of this report, it is not necessary to particularise.

At length, in June, 1836, the respondent, Mrs. Ross, brought a reduction of the decree of adjudication, which had been obtained by Messrs. Drummond, and of its warrants, upon a variety of grounds, and among others upon the following:—"*Decimo*, The "entail of the said estate of Cromarty having been duly recorded "in the register of tailzies in terms of law, on the 27th day of "May, 1803, the said estate was from that day withdrawn from "all liability for the personal debts of the said Alexander Ross, "and no debt subsequently contracted by him could henceforth "be legally or competently made a ground for adjudging the "said estate; but, in point of fact, no debt whatever was due by "the said Alexander Ross, or the Company of Ross and Ogilvie, "to the said Robert and Andrew Berkeley Drummond, or their "successors or representatives, under the said bond and promissory-notes, or otherwise, on the said 27th May, 1803; and, on "the contrary, the said Robert and Andrew Berkeley Drummond were largely indebted to the said Company of Ross and "Ogilvie, on the said day; and therefore, the said pretended "decrees are illegal, incompetent, unfounded, and null and void.

"*Undecimo*, Any debt that may have been due by the said "Company of Ross and Ogilvie, or the said Alexander Ross, to "the said Robert and Andrew Berkeley Drummond, or to their "representatives, under, or by virtue of the said bond and promissory-notes, or otherwise, has been fully paid, extinguished, "and discharged by payments, intromissions, transactions, compensation, and otherwise, to be more fully condescended on in "the course of the process to follow hereon, and upon a just and "true accounting between the said parties, no sum whatever is "due by the said Company, or the said Alexander Ross, to the "said Robert and Andrew Berkeley Drummond, or their repre-

sentatives, under the said bond and promissory-notes, or otherwise."

Messrs. Drummond, who were subsequently represented by the appellants, pleaded a variety of pleas to this action, only two of which, from the course the decision of the case took, it seems necessary to mention. These were in these terms:—

"2nd. As the bond and promissory notes were not entered "to the debit of Messrs. Ross and Ogilvie's account, but were "kept as separate and distinct obligations for money instantly "advanced, the Messrs. Drummonds were not bound to impute "the balances on the current account, to payment of them, but "were entitled to keep them as separate vouchers of debt.

"3rd. Under any circumstances, the objections now raised "by the pursuers, are incompetent, seeing that Messrs. Ross and "Ogilvie settled their accounts for many years with the Messrs. "Drummond, and that in all of them the interest charged on "those advances was entered, and that the balance, when in "favour of Ross and Ogilvie, was never imputed to the payment "of these separate obligations."

From the evidence adduced in this action, it appeared that in the course of the dealings between Ross and Ogilvie, and Drummonds, the balance upon the general account in the books of the latter firm was constantly varying in its character; sometimes being in favour of Ross and Ogilvie, and sometimes against them; but in most instances the balance, though in favour of Ross and Ogilvie, was greatly under the amount of the loans made to them in 1796 and 1798, and which, as already mentioned, had never been passed to their debit in the general account. On the morning of the 27th day of May, 1803, the day on which the entail was put upon record, the balance was in favour of Ross and Ogilvie, to the amount of 17,994*l.* 14*s.* 3*d.*, and at the close of that day it was 15,549 11*s.* 2*d.* This was altogether exclusive of the sums advanced in 1796 and 1798, which, together, amounted to 18,584*l.*, after giving credit for the 6000*l.* paid to

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account of the 9000*l.* loan, but it included a sum of 19,958*l.*, 4*s.* 10*d.*, which Drummonds had drawn two days before upon cheques from the War Office, sent to Ross and Ogilvie, and delivered by them to Drummonds. Between which time and the 27th, no money had been paid in by Ross and Ogilvie to the credit of their account.

It further appeared, that Drummonds, after bringing their action of constitution and adjudication for the full amount of the advances upon the bond and notes, obtained payment under the collateral securities of a sum of 3036*l.* 3*s.*, that they handed over some of those securities to the assignees of Ross and Ogilvie's estate, under an agreement between them, and that others of the securities had been unavailable from disputed causes, whether through the inability of the debtors, or the *laches* of Drummonds, did not appear.

Upon the 3rd of March, 1841, the Court (*First Division*) pronounced the following interlocutor:—"The Lords having "advised the revised cases for the parties and whole cause, find "that the estate of Cromarty was held by the late Alexander "Ross, under a settlement of strict entail, which was duly "recorded in the register of tailzies on the 27th day of May, "1803, and that thereafter the said estate was not legally liable "to, or adjudgeable by, creditors of the said Alexander Ross for "any subsequent debts of his. Find it sufficiently established "by the evidence in process, that according to the true state of "the accounts and mutual claims and transactions between the "defenders and the Company of Ross and Ogilvie, on the said "27th day of May, 1803, and taking into view the collateral securities "pledged with, and held and used by the defenders in payment "of their claims, there did not exist on that day, under the "bond and promissory-notes libelled on in the actions of constitution "and adjudication, any debt or claim on the part of the "defenders, which could by the law of Scotland, be the ground "of any judgment either against the said Alexander Ross, or the

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"said entailed estate. And, therefore, to the above effect sustains the tenth and the eleventh reasons of reduction stated in the summons of reduction dated and signeted the 29th June, 1836, and reduce, decern, and declare, in terms of the conclusions of the said summons. Find it unnecessary, *in hoc statu*, to determine any of the other points at issue between the parties, and decern."

The appeal was against this Interlocutor.

Sir C. Wetherel, *Mr. Swanson*, and *Mr. Anderson*, for Appellants.—The entry of the several sums advanced by Drummonds to Ross and Ogilvie, in 1796 and 1798, to the credit of their general account, was equivalent to an actual payment of so much money, and the nature of the securities given for the repayment of these advances, and the dealings of the parties in regard to them, show that they were in fact, and were treated by the parties as a debt, separate and distinct from the general account, and independent of the state of the balance upon it. Each of the three instruments constituted an independent debt, and their nature was altogether unaffected by the mode in which the advances were made, for which they were given as a security. The balance, which was in favour of Ross and Ogilvie, on the 27th of May, 1803, was in no respect a payment of this separate and distinct debt, otherwise it would have been long previously extinguished on any of the many days in which the balance was in favour of Ross and Ogilvie, to an amount exceeding this debt. The only way in which the debt can be extinguished, is by setting off against it the balance upon the general account, but this operation was not made on the 27th May, 1803. The debt was not brought into the account on that date, nor was the account balanced in any way whatever; and set-off does not operate *ipso facto*, or *ipso jure*, it must be proponed and allowed, in order to operate; and here the balance, which on the close of the 27th May, 1803, was 15,549*l.*, was in the subsequent month gradually

reduced, until at length it was turned the other way, the account being actually overdrawn. Carmichael *v.* Carmichael, *Mor.* 2677; Bailie *v.* M'Intosh, *Mor.* 2680; M'Culloch *v.* Maxwell, *Mor.* 2550; Haldane *v.* Douglas, *Mor.* 2690; *Ersk.* iii. 4, 12. Nay, more, Ross and Ogilvie, after the 27th May, 1803, paid interest upon the loan debt as still subsisting and uncompensated. To hold that there was a constructive set-off as with the heirs of entail, would be to place them in a better situation than the debtor here, for which there is not any authority.

If Ross and Ogilvie could not have pleaded compensation, as little can the respondents upon any supposed *jus crediti*, as heirs of entail. Alexander Ross was liable, as holding the lands in fee simple; and any interest which the respondents can have in defending the lands against this liability, can only be as his representatives and successors: they have none under the entail. The lands in his hands were liable as for entailer's debts, and the creditors in such debts cannot be affected by any subsequent registration of the entail. If the adjudication of the lands was well led in the lifetime of Alexander Ross, it cannot be affected by his subsequent death.

But if compensation were pleadable at all, it could only have been pleaded in defence to the action of constitution on which the adjudication was founded. Not having been then brought forward, it cannot be pleaded, after decree in that action, either by Alexander Ross, or by any one in his right,—1592, cap. 141. Rae *v.* Clerk, *Mor.* 2571.

Moreover, compensation or set-off could not have taken place upon the balance, on the general account at 27th May, 1803, inasmuch as that balance was composed of Crown money appropriated for particular payments, which had come into the hands of Drummonds, with the knowledge that it had that character: compensation or set-off, therefore, could not have taken place without the assent of the Crown. If Ross and Ogilvie had become bankrupts on the 27th May, 1803, the Crown

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could, by writ of extent, have attached the whole balance in Drummonds' hands, and that by an extent *in chief*, and not *in aid*, for Drummonds, with the notice they had of the character of the money, would have been direct debtors to the Crown, the money being easily identifiable from the other monies of Ross and Ogilvie, from the circumstance that no money had been paid by them to the credit of their account between the day on which this Crown money had been received by Drummonds for them, and the 27th May; and if the question is to be taken as if the pure result of the accounts had been ascertained as on a particular day, the 27th of May, the right of the Crown as on that day cannot be thrown out of view. If, in another view, Ross and Ogilvie had, on the 27th May, 1803, required Drummonds to write off the sums owing upon the bond and notes, there was nothing with which they could have done so, as the balance on the general account in favour of Ross and Ogilvie was composed, not of their money, but of Crown money liable to the claims of the Crown, and which continued in that state until after the 27th of May.

The effect of the judgment below is in truth, that because the account went on after the 27th of May, 1803, the debt which was due before, and at, and after that date, was not due before.

Mr. Solicitor-General, *Mr. Pemberton Leigh*, and *Mr. Gordon*, for Respondents.

LORD CHANCELLOR.—The first question for consideration in this case is, as to the state of the account between the parties at the registration of the entail, viz., on the 27th of May, 1803. The defendants, the Messrs. Drummond, held a bond and two promissory notes of Ross and Ogilvie, amounting in the whole to 24,000*l.*, bearing interest at five per cent. For this sum Messrs. Ross and Ogilvie had credit in their banker's account with Messrs. Drummond, and the amount was afterwards drawn out

by them in the usual course of their business. The securities thus given were therefore for money advanced by Messrs. Drummond to Ross and Ogilvie, for that was the substance of the transaction,—a debt was thus constituted to the amount of the securities. The interest was from time to time charged in the banking account, but the principal was not included in that account, nor was it the intention of the parties that it should be included. It was obviously meant as a loan to be repaid when Messrs. Drummond should require the repayment. Although large sums of money were from time to time paid into the banking account by Ross and Ogilvie far exceeding this advance, such payments cannot be considered as liquidating this debt. It was not in the view of either of the parties that the should be so applied. This debt, after deducting a sum of 6000*l* paid specifically on one of the securities, continued therefore to be a subsisting debt up to the date of the registration, viz., the 27th May, 1803.

On the other hand, there was on that day a balance due upon the banking account to Messrs. Ross and Ogilvie, amounting to 15,549*l.* 11*s.* This arose from a sum received by Messrs. Drummond in respect of a cheque upon the Bank of England drawn by the Paymaster of the Forces in favour of Ross and Company, payable to them or bearer, and which they had delivered in the usual course to Messrs. Drummond to obtain payment on their account. For this sum so received Ross and Ogilvie had credit as for so much cash in their banking account.

The balance thus admitted to be due, and so composed, constituted a debt from Messrs. Drummond to Ross and Ogilvie, and for such debt they might have maintained an action. It is said that the money received on the cheque was money belonging to the Crown, to be applied to a particular purpose by Ross and Ogilvie, as army agents. But that does not affect the question as between these parties. The money was to be applied by Ross and Ogilvie, or by their order. It was received on their

account by Messrs. Drummond, and unless the Crown had intervened, they were bound to pay it to them. It follows, therefore, from this view of the facts, that upon the day in question (27th May, 1803), there were mutual debts between these parties,—a debt due on the securities to Messrs Drummond; a debt due on the balance of account to Messrs. Ross and Ogilvie. The parties might each of them have maintained a suit for the amount of their claim. In like manner they might each of them have set off that amount in a suit brought by the other.

The question to be considered is, as to the effect of this state of things upon the entail. If the debt due on the 27th of May, 1803, upon the banking account, could in point of law be considered as payment, or a discharge of the debt due in respect of the securities, it is clear, supposing the amounts to be equal, that the adjudication could not be sustained, for there would have been no debt to support it. Here, however, the debt was a subsisting debt, and the whole question turns upon the cross demand, the subject of set-off, or, as it is called in the law of Scotland, compensation.

From the moment the entail was registered, the right of the parties became fixed. They could not be changed by any subsequent act to the prejudice of the heirs of entail. At that period there were mutual claims. Upon taking the account, the balance would be the sum due; that is all that the creditor could properly demand in payment—all for which he could reasonably require security.

The form of a decree of adjudication, founded on the Act "Anent adjudications, 1672," is, "that so much of the lands "ought to be adjudged as shall be worth, and will pay and "satisfy the debt." And this is accompanied with the averment, that "the pursuers can get no payment of the said debt, "nor security for the same." How can it properly be said that the pursuer cannot get payment of his debt, nor security for the

same, where it is balanced by a debt due from himself to his debtor? It is obvious, therefore, that a plea of set-off, or compensation, would, if advanced at the proper period of the proceeding for such purpose, viz., in the suit of constitution, prevent the adjudication. But if this be so, then how, after the rights of the parties are fixed, can any neglect or omission on the part of the defendants in such a proceeding to take the necessary steps to ascertain the sum really due to the pursuer, be suffered to prejudice the heirs of entail? How can a decree in absence, in which the claim on one side only is brought forward, as in the present case, be allowed to have this effect?

The set-off, in this case, would reduce the sum due on the 27th May, 1803, to a sum less than 3000*l.* The sum due on the securities, including interest, amounted to 18,382*l.* 10*s.* The sum due on the balance of the banking account was 15,549*l.* 11*s*

A sum much larger than this balance has been received from the collateral securities deposited with the bankers when the money was advanced, and the produce of which is primarily applicable to the liquidation of this debt. The defendants admit that they have received 1467*l.* on their securities, in respect of the promissory note for 3000*l.*, and 1569*l.* in respect of the promissory note for 10,000*l.* But it is unnecessary to go into detail upon this part of the case, for they have disposed of the securities for their own benefit, and have thereby much more than liquidated the balance due on the 27th May, 1803. It is clear therefore, that the adjudication cannot be continued.

As to the promissory note for 7000*l.* of the 4th December 1801, upon which some argument has been founded, it will not affect the result of this case. It appears by the paper entitled "Messrs. Ross and Ogilvie's debt account with Messrs. Drum-"mond," that this debt was paid out of the collateral securities forming a part of that transaction, as far back as the years 18 and 1805, and in fact the payment is admitted in the statement of the defendant's reasons of appeal. Admitting that this

a part of the debt due on the 27th May, 1803, this, as well as the balance remaining of the 18,000*l.*, after deducting the sum due on the banking account, has been paid out of funds specifically appropriated for that purpose.

Nothing, therefore, remains payable in respect of the debt that was due on the day in question, and it follows, therefore, that the adjudication cannot now be sustained, and the judgment must therefore be affirmed.

LORD CAMPBELL.—My Lords, I heard this case with my noble and learned friend, and I entirely concur with him in the opinion he has expressed.

LORD BROUGHAM.—I entirely agree, also, with my noble and learned friends.

Interlocutor affirmed with costs.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the Interlocutor therein complained of be affirmed, with costs.

EDWARD WHITE—HOOPER and WATKINS, Agents.

[Heard 28*th March*. Judgment, 4*th September*, 1844.]

WILLIAM MURRAY, ESQ. of Touchadam and Pitlochie, *Appellant.*

MISS ANNE MURRAY and others, Heirs of Entail of the Lands of Cockspow, *Respondents.*

Tailzie.—Where selling, alienating, and disponing are prohibited, the irritant and resolutive clauses, though using the terms "alienating" and "disponing," but dropping that of *selling*, will be effectual to prevent sales.

Ibid.—The meaning of the word "deeds," where used referentially, is to be construed by the words to which it refers, and construed in this manner was *held* to mean sales.

Ibid.—A general prohibition to do a certain act is not limited by a subsequent description of one of the consequences of the act, but will include all the consequences.

THE appellant was heir of entail in possession of the lands of Pitlochie, under an entail bearing date the 29th of May, 1727, and he was also proprietor in fee-simple of the lands of Cockspow.

In 1817 he obtained an Act of Parliament, authorising him to sell the lands of Pitlochie upon his entailing the lands of Cockspow, by a deed "containing all clauses needful in favour "of the heirs called to the succession by the aforesaid entail of "the estate of Pitlochie, and according to the same series and "substitution, and under all the provisions and conditions, "declarations and clauses prohibitory, irritant, and resolutive, "that are contained in the said deed of entail; and which entail "shall bind the institute as well as the substitutes, so that the

" said lands of Cockspow, and others so to be conveyed, may be " enjoyed by the same persons who would, under the said deed " of entail of Pitlochie, have enjoyed the said entailed estate, to " be sold as aforesaid."

In compliance with the terms of this Act, the appellant, on the 3rd day of March, 1825, executed an entail of the lands of Cockspow, by a deed which contained the following prohibitory, irritant, and resolutive clauses, which, in their expressions, were the same *mutatis mutandis* with the like clauses in the entail of Pitlochie of 1727. " And sicklike, it is hereby expressly pro- " vided and declared, and shall be so declared by the infeftments " to follow hereupon, and by the services, retours, precepts, and " instruments of sasine, of me or the succeeding heirs of tailzie " in all time coming, that it shall be noways leisome nor lawful " to, nor in the power of me, or the heirs-male or female of my " body, nor of the other heirs of tailzie above written, nor the " descendants of their bodies, to sell, alienate, or dispone the " lands and others before rehearsed, or any part or portion " thereof, either irredeemably, or under reversion, or to grant " wadsets or infeftments of annual rent furth of the same, or to " burden the said lands with any servitude or other burdens " whatsoever; nor to set nor grant any tacks of the same above " the space of ten years, and not under the ordinary rent; " neither shall it be lawful to them, nor in the power of them, " or any of them, to contract any debt whatsoever, nor to commit " any crime of whatsoever kind, and particularly the crime of " treason, or any species of it, or to do or commit any other fact " or deed, civil or criminal, whereby the lands and others " before mentioned, or any part thereof, may be apprised or " adjudged, or any other manner of way evicted, forfeited, or " become caduciary, or the order of succession hereby set down, " anywise altered, innovate or infringed, in prejudice of this " present tailzie, or of these who shall succeed in virtue thereof; " and if I, or any of the heirs of tailzie, of whatsoever sex, that

" shall happen to succeed, by virtue of these presents, in time
" coming, or my or their descendants, shall do anything in the
" contrary of the said provisions, either by alienating or dis-
" poning the lands and others before written, or any part thereof,
" or contracting debts either real or personal, or by committing
" the crime of treason, or any species thereof, or any other
" crime or delict, or doing any other deed civil or criminal, the
" said debts, deeds, crimes, and delicts, and all and every one of
" them, shall not only, *ipso facto*, become null and void, in so far
" as concerns the lands and others before written, so that they
" shall be nowise affected or burdened therewith, in prejudice of
" the succeeding heirs of tailzie and provision; but also the con-
" traveners shall not only forfeit, amit, and tyne their right to
" and interest in the lands and others before specified, but like-
" wise to the mails, duties, rents, profits, and casualties thereof,
" and the same shall be nowise affectable by the contravener's
" creditors, nor shall they be affectable by them, nor fall under
" their single or liferent escheats; and the said haill lands, and
" maills and duties thereof, shall, *ipso facto*, from and after the
" respective deeds of contravention, be devolved upon, and per-
" tain and belong to the person that shall be next, and have
" right to succeed by virtue hereof, free from all debts, deeds,
" crimes, and delicts done, contracted, and committed by the
" contraveners; and it shall be lawful to the person having
" right to succeed, to use any legal or formal method for esta-
" blishing the right of the said lands in their person, in re-
" pect the contravener's right will be resolved and extinct from
" the time of the contravention, as if he were naturall
" dead."

A subsequent clause declared that if the granter, or any
the heirs, should omit to obtain themselves entered in the land
within a specified time, " I and they shall not only forfeit, ami-
" and tyne my and their right to, and interest in the lands a
" others before written, but also to the maills, duties, ren

" profits, and casualties thereof; and they shall be nowise " affectable by any of the contravener's creditors, nor shall the " same be assignable by them," &c.

Another clause was in these terms: " And likewise it is " hereby expressly provided and declared, that if I, or any of the " heirs of tailzie, or my or their descendants, shall be owing, or " shall have contracted any debt, or committed any crime or " delict, or shall happen to become liable for any debts for myself " or themselves, or as representing any others before my or their " succession to the said lands, and others before written, or for " any other cause whatsoever. In that case, these debts, deeds, " and crimes shall be void and null in so far as concerns the " lands and others before rehearsed, nor shall the same, nor the " mails and duties thereof, be affectable therewith any manner " of way, neither shall it be leisome nor lawful to me or any of " the heirs of tailzie in time coming, in the case before mentioned, " to assign the mails and duties of the said lands for payment of " any such debts that I or they shall happen to be owing or " become liable to, before my or their succession, nor shall the " said maills and duties, or any part thereof, in that case be " affectable by my or their creditors, nor fall under my or their " single or liferent escheat, in prejudice of the said heirs, their " wives and children, and others that shall succeed to me or " them by virtue hereof, and I and the said heirs shall be holden " to pay the same, and to free myself and themselves from all " debts and deeds whereunto I or they might be made " liable."

The appellant, conceiving that the resolutive and irritant clauses were not effectual against sales, executed a missive of sale to John Murray, and then brought an action against the substitute heirs of entail, to have it declared that he had full powers to sell the lands of Cockspow; that the missive of sale constituted a good and valid sale, and binding on the said pursuer, who is bound and entitled to implement the same, and that the said

sale is nowise affected by or challengeable under the said disposition and deed of entail, nor by any of the provisions, qualifications, limitations, conditions, restrictions, and clauses irritant, therein contained; and further, that the said pursuer, being bound and obliged to give the said John Murray a valid and sufficient title to the said lands, and others, he is not prevented from so doing by the said disposition and deed of entail, nor by any of the clauses therein contained, and that the pursuer has full and undoubted right and power to grant and execute all dispositions and other deeds that may be requisite or necessary for effectually conveying the said lands and others sold by him to the said John Murray, and that the pursuer is not prevented from selling the said lands in manner before mentioned, nor from granting and executing the dispositions and others before mentioned, by the said disposition and deed of entail, or by any of the titles under which the pursuer possesses the said lands and others. Here, then, followed a conclusion that the pursuer had an absolute right to the price of the lands.

At the same time John Murray, the purchaser, brought an adjudication in implement of the missives of sale. The defenders pleaded in answer to the action by the appellant,—

"I. The entail of Cockspow contains an effectual prohi-
"bition against the heir in possession selling the estate, and
"consequently the pursuer, in entering into the missive of sale
"libelled on, acted beyond his powers, and in contravention of
"the entail.

"II. At all events, the pursuer is not entitled to have it
"declared against the defenders, that he has right to grant
"dispositions of the entailed lands.

"III. The pursuer is barred, *personali exceptione*, from
"violating the prohibitions of the deed of entail executed by
"himself.

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" IV. Even if the sale of the lands were found good, the pursuer is bound to reinvest the price for the benefit of the substitute heirs."

The Lord Ordinary (*Cunninghame*), after argument before him, appointed the parties to put in cases, and after considering these papers, his Lordship made avizandum with the cause to the Inner House, accompanying his interlocutor with a full note, expressing doubts upon the question raised. The Inner House ordered the opinions of the other Judges to be taken; that opinion was unanimous, and was delivered by Lord Moncrieff in the following terms:—

The object of this action is to have it found and declared, that the pursuer has power to make an effectual sale of the lands of Cockspow and others, in which he stands invested under a disposition and deed of entail executed by himself, in obedience to the express provisions of an Act of Parliament of the 57th Geo. III. The summons sets forth, by a recital of the terms of that entail, that the pursuer had succeeded to the lands of Pitlochie and others, as an heir substitute of entail, under a deed executed by Patrick Murray in 1727; and that, having become proprietor of the lands of Cockspow and others in fee-simple, he had obtained an Act of Parliament for enabling him to sell the said lands of Pitlochie and others, at the sight of this Court, on condition that the price should be applied in the purchase of the lands of Cockspow and others, and that these lands should be entailed on the same series of heirs, he being bound to execute, at the sight of the Court, a deed of entail, 'containing 'all clauses needful, in favour of the heirs called to the succession by the aforesaid entail of the estate of Pitlochie, and 'according to the same series and substitution, and under all the 'provisions and conditions, declarations, and clauses prohibitory, 'irritant, and resolutive, that are contained in the said deed of 'entail, and which entail shall bind the institute as well as the 'substitutes,' &c. It is further set forth, that the sale took

place, and that the entail of Cockspow was executed in terms of the statute, on which the pursuer was infeft. Then the summons states, that the pursuer has entered into an onerous contract for the sale of these lands of Cockspow and others, and proceeds to conclude to have it found and declared—1st, 'That the pursuer has full undoubted right and power to sell the said lands of Cockspow,' &c. in any way he may think proper, at a fair price, 'or other onerous consideration;' and 2d, 'That the foresaid missives of sale, entered into between him and the said John Murray as aforesaid, constitute a good and valid sale, and binding on the said pursuer,' &c.

It certainly presents a remarkable peculiarity in this case, that the pursuer, after having found it necessary, with the consent, it may be presumed, of the substitute heirs of entail, to obtain an Act of Parliament for enabling him to sell the lands of Pitlochie, which he held under an entail said to have contained precisely the same clauses, which, in terms of that Act, were made to constitute the conditions of the entail of Cockspow, should now bring an action to have it found by this Court, that notwithstanding those clauses, he has power to sell the lands of Cockspow absolutely and unconditionally. The meaning of this, however, is plain enough. It must be supposed, either that the pursuer has now discovered some essential defect in the entail, which was not observed while he held the lands of Pitlochie, or otherwise that the law and the principle of judgment in such cases have been changed, since the time when the Act of Parliament was obtained, and the new entail was executed under the authority of this Court. Whatever may have been the decisions pronounced in particular cases, and however it may be thought that there is difficulty in this as in other branches of law, in reconciling all the decisions, I cannot assent to the proposition, that the law, or the principle of judgment in the application of it, has undergone any change. But it is a possible thing, that the discussion of other cases may have disclosed a

legal defect in this entail, which had not before occurred to the party or his advisers: and, if it be so, it is perfectly fair for the pursuer to try the question, concerning the extent of his power with reference to onerous deeds of sale.

It seems to be very clear, on the one hand, that the pursuer can be in no better situation, as the fiar in possession under the entail of Cockspow, than he was as the entailed proprietor of Pitlochie. All the restraining clauses being, as the Act of Parliament required, expressly applied to him as *institute*, he can have no power which he would not have had as the *substitute* heir under the entail of Pitlochie; and it is impossible that, by the change of the lands, effected only at his own desire, with the consent of the heirs of entail, and by the force of a statute, all being completed in due form and in compliance with the Act 1685, he can have obtained any advantage against the heirs of entail, which he did not possess before, in regard to the lands of Pitlochie. But, on the other hand, it does not appear to me, that he can be in a worse situation with regard to any question of power, according to the legal import of the entail. For although the Act of Parliament was no doubt applied for and obtained, in the belief that the entail of Pitlochie contained effectual restraining clauses against all sales and alienations, yet, if it should appear that it was not *de facto* and *de jure* effectual for that purpose, it must then be held that the pursuer might have sold Pitlochie without asking for any Act of Parliament, and might still have possessed Cockspow in fee-simple. And it does not appear to me, that the mere circumstance of the entail of Cockspow having been necessarily executed by the pursuer himself under the Act of Parliament, can have any effect in the question concerning the legal construction of the entailing clauses as they stand. I do not think, therefore, that the plea last insisted on in the case for the defenders (the 3rd plea in law in the record), could be available against the declaratory conclusion of the summons, if that conclusion should be found to be in itself

well-founded. Every thing must depend on what the legal effect of the entail really is.

The question then is, whether this entail is effectual to prevent a sale of the estate. The pursuer takes two points,—1st, That there is a defect in the *resolutive* clause; and 2nd, That the *irritant* clause is also insufficient.

1. The objection to the resolutive clause is no new discovery. It is, that whereas the prohibitory clause prohibits the heirs to *sell*, *alienate*, or *dispone* the lands; the resolutive clause, which is combined with the irritant, only declares that the heirs shall forfeit if they 'shall do any thing contrary to the said provisions, 'either by *alienating* or *disponing* the lands, &c.,' the word *selling* not being repeated. If this objection were well-founded, it probably would apply to both the clauses. But as the very point has occurred, and has been decided both by this Court and in the House of Lords, even with reference to a more doubtful case, and as there is yet no decision whatever to the contrary, I am of opinion that the plea cannot be sustained.

It appears to me, that the present case must be ruled by the two judgments in the case of Elliot of Stobbs, the one in 1803, and the other by the House of Lords in 1821; and that it is too late to argue this question as a matter of abstract law. The question in the case of Elliot, May 19, 1803, was identical with the point raised in the present case, with only the important difference, that in the resolutive clause of the Stobbs entail, the word *alienate* did not occur. The prohibitory clause prohibited the heirs 'to 'sell, *annailzie*, wadset, *dispone*, dilapidate, and put away.' The resolutive bore only the words 'or who, whether male or female, 'and I, shall *dispone* the said lands and estate,' &c. Sir William Elliot had entered into a minute of sale, as the pursuer has done. The purchaser suspended on the ground that Sir William had no power to sell; and Sir William brought a declarator to have it found that the entail was not effectual to prevent a sale. The Court sustained the defences, holding the entail to be good. I

can see no difference between that case and the present, except a difference which is very strong against the pursuer, that here the word '*alienating*' is in the resolutive clause. I am not aware that it has ever been doubted, that *sales* are comprehended under the word *alienating*. But in Elliot's case the term *dispone* alone was held sufficien.

The discussion on that entail was renewed in 1813, in relation to the validity of a long lease. This proceeded on the notion that, however the word *dispone* might be sufficient to cover *sales*, it was not equivalent to the term *alienate*, under which the Court had found in the Queensberry cause that long leases were effectually prohibited. This argument prevailed in this Court at the time. But the case having been appealed, the Lord Chancellor Eldon, on very deliberate consideration, reversed the judgment, and found *in terminis*, 'that, according to the true con-'struction of the deed of entail of the estate, the prohibition to '*dispone* extends to the lease in question, *and that the irritant* '*and resolutive clauses do so refer to the specific prohibition to* '*dispone, as to render the same effectual against third parties.*' It is impossible not to see, that this judgment was a great deal stronger than the decision in 1803. It had long before been decided in the case of Humbie, that a clause prohibiting to *dispone* was sufficient as a *prohibition* against *sales;* and the judgment in 1803 simply held the same term to be sufficient in the *resolutive* clause to cover sales. Lord Eldon's judgment, again, in express words declares the irritant and resolutive clauses expressed by the term *dispone* to be sufficient, by relation to the same term in the prohibitory clause, to secure the entail against third parties. But it was evidently going a step farther, to hold that, under an entail which prohibited to *sell*, *annailzie*, wadset, *dispone*, &c., the term *dispone* alone in the resolutive clause was sufficient to cover the case of *a long lease.* Yet there would have been no question there, if the term *alienate*, as well as *dispone*, had been in the resolutive clause, as it is in the entail of

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Cockspow. It is, however, also of the greatest importance, that the Lord Chancellor, in pronouncing that judgment, referred expressly to the numerous previous decisions on the effect of the word *dispone;* and though, among those quoted to him, the case on the same entail in 1803 was very prominently presented, there is no trace of his having expressed the least doubt concerning the soundness of the judgment pronounced in it. There is, besides, another case, in which all the same doctrine concerning the import of the term *dispone* was in express terms confirmed. Stirling *v.* Dun, House of Lords, June 22, 1829, *W.* and *S.* 3, p. 462.

Holding, therefore, that the answer to the pursuer's objection in the present case follows *à fortiori* from these decisions; and being farther of opinion, that, even independent of them, the terms of the resolutive clause in the entail of Cockspow are sufficient, I think that this plea on the part of the pursuer must be rejected.

2. The special objection taken to the validity of the *irritant* clause is of a different nature, and may admit of more doubt. It seems to have been suggested by the late decision in the House of Lords, in the case of Lang against Lang. But, as it appears to me, that the terms employed in the present case, are of a very precise and determinate nature, and that there is an important difference between it and the case of Lang, I am not able to come to the opinion, that the irritant clause is not sufficient to protect the estate and the heirs against a sale or alienation.

After the prohibitory clause, the entail proceeds to provide, that 'if I, or any of the heirs of tailzie,' &c. 'shall *do any thing* 'in the contrary of the said provisions, either by *alienating or* 'disponing the lands and others before written, or any part there-'of, or *contracting debts*, either real or personal, *or by* committing 'the crime of treason, or any species thereof, or any other crime 'or delict, or doing any other deed, civil or criminal, *the said* 'debts, *deeds*, crimes, and delicts, shall not only *ipso facto* be-

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'come null and void in so far as concerns the lands and others 'before written,' &c.; but also the contravener shall forfeit the whole lands, which shall *ipso facto*, 'from and after the *respec-* '*tive deeds* of contravention,' devolve upon the next heir, who shall have right to succeed 'free from all debts, *deeds*, crimes, and 'delicts, *done*, contracted, and committed by the contraveners,' &c.

There can be no doubt concerning the obvious meaning of these clauses. But I fully agree in the statement, that, in such a question of construction, the mere intention to be discovered from a comparison of the different clauses of the deed is not sufficient. It is quite unnecessary to go into any detail of the authorities in this matter. I only think it necessary again to observe, that I cannot entertain the idea, that any of the later decisions which have been pronounced in this Court, or in the House of Lords, have made any change on the rule or principle of the law for the construction of such deeds, as being *strictissimi juris*. The application of the principle to particular cases, is often a matter of great difficulty; and, in reviewing such cases, it may be thought by individual lawyers, that in some of them it has not received full effect, and in others has been carried too far. But the principle itself is fully recognised throughout them all, and in truth has never been disputed in any one of them, though parties may have contended, and Judges may have thought, that it was sometimes strained to excess, and sometimes did not receive the effect due to it. And it appears to me, that any of the late decisions, which are supposed to have altered the principle of judgment, are no more than exemplifications of the application of the principle of strict construction, always acknowledged, according to the view taken of the special case before the Court.

Waving any farther discussion on this subject, let it be observed, that the passage of the entail from which the above excerpts have been made, constitutes one unbroken sentence,

embracing both the irritant and the resolutive clauses, and that the full legal import of it cannot be seen without taking into view the whole parts of it. It is all governed by the hypothesis with which the clause begins—'*If*, I, or any of the heirs,' &c. 'shall *do any thing in the contrary* of the said provisions,' &c. This is no doubt followed by an enumeration of particulars, which, according to the rule established, at least since the case of Tillicoultry, does and must qualify the general term. But, unlike the clause in Tillicoultry, the special acts here enumerated *do* comprehend the case of sales. Not to go back on the point already considered, the words are express, that if the pursuer or any of the heirs shall do any thing in the contrary of the provisions, 'either *by alienating or disponing* the lands,' &c., which words, even in an irritant and resolutive clause of an entail, which in the prohibitory clause has the word 'sell,' must be held to be sufficient to comprehend sales. The second case in the hypothesis is 'or *contracting debts.*' There is a third case, that of committing treason or any other crime: And then there is a *fourth* more general and comprehensive supposition, viz., by '*doing any other deed*, civil or criminal'—that is, any *other* deed contrary to the provisions. It is of very great importance, that *all* these cases or supposed acts of contravention are *alike* under the form of the first words—'*If* I, or any of the heirs' 'shall do 'anything contrary to the provisions,' '*either by* selling,' &c. The clause, being so far made special by the enumeration, must be so regarded and dealt with; and all the cases are covered alike by the words 'If,' &c. Now it must certainly be supposed, in giving effect to such an express provision as this, that *something* is to follow in *all* and *each* of the cases stated, and more especially in those which are specific and definite—'alienating or disponing' —'or contracting debts.' The sentence is not completed till that consequence is laid down. It is possible, no doubt, that by confusion or inadvertency, the words employed may be insufficient. But the question is, whether they are so or not. If they are in

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their nature and import sufficient for the natural purpose of covering the supposed acts of contravention, and so completing the sentence with reference to all of them, there is here no confusion or cause of ambiguity, to make it the duty of the Court to refuse effect to them in any particular case. The consequence, then, is thus laid down,—'the said debts, *deeds*, crimes, and delicts, and *all and every one of them*, shall not only *ipso facto* become null and void,' &c. That the word *deeds* is in itself technically sufficient to comprehend all deeds of *alienation* or *disposition*, and so to cover the special case in the first part of the hypothesis put, which again is equivalent to sales, will not admit of any serious doubt. For many entails, which have been sifted to the uttermost, had no other word to protect them against sales; as in the Roxburgh entail, in which the irritant clause was simply 'all *whilk deeds* so to be done,' &c. Neither in the present case is there any room for the construction, which has been applied in some other cases, that the words have reference only to the last member of the enumeration—'or doing any other deed, civil or criminal.' The whole structure of the sentence forbids this: But it is also excluded by the circumstance, that *debts* and *crimes*, which stand *before* that clause, are clearly and expressly included in the declaration of nullity. The word 'debts' is not in the general clause; and the specification of them may have seemed to be necessary with reference to the contracting of *personal* debts, as to which no deed or writing of any kind may be executed.

But it is to be observed, that this declaration of nullity does not terminate the sentence. Other consequences are to follow, which all hang upon the same hypothesis, and are also evidently dependent on the nullity of the deeds. The clause goes on—'*but also* the contraveners, shall not only forfeit' all right to the estate, but likewise to the rents, &c.; and the lands and mails, &c., 'shall *ipso facto*, from and after the respective *deeds* of contravention, be devolved on and pertain, &c. to the next heir, 'free from *all* debts, *deeds*, crimes, and delicts, *done*, *contracted*,

'and *committed* by the contraveners,'—that is, *applicando singula singulis*, 'deeds *done*, debts *contracted*, or crimes *committed;* and 'it shall be lawful for the next heir to establish his right as i 'the contravener were naturally dead.' This completes the sentence; and it will be observed, that all the last words are perfectly general, and cannot by possibility be confined in their application to any particular part of the hypothetical cases o contravention stated in the first part of it. They evidently do and must apply equally to them all. Yet they only follow and are dependent on the irritancy or nullity first declared, proceeding on the entire hypothesis in the first part of the sentence.

From the peculiar structure, therefore, of the whole clause in this entail, it seems to me to be impossible, on any construction however strict, to hold, that there is not a complete and express irritant clause applying to all deeds of alienation or disposition, wherein sales are necessarily comprehended.

The case which apparently gives the most probable support to the pursuer's argument, is that of Lang v. Lang, as decided in the House of Lords. I am bound to hold that case to have been rightly decided, though the judgment of the Court here was different; and I do so hold it. But there is the most marked difference between it and the present case. The clause is constructed in an entirely different manner from that followed in the entail of Overtown. In general, the safest form for making an effectual irritant or resolutive clause is to rest on a general assumption of any contravention of the conditions or prohibitions before laid down; because, in any special enumeration, there always a danger of some important article in the prohibitory clause being omitted, which no general words prefixed or added to the enumeration will in that case legally supply. But there is a different danger in the other form. If care be not taken, the position and terms of the general clause of irritancy, to make it expressly and necessarily apply to all the parts of the prohibitory clause, and to exclude any more limited application,

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principle of strict construction may make it necessary to understand it in a more limited sense in favour of freedom, because the words admit of such an interpretation. This seems to be the principle of the case of Lang, as it was of that of Adam *v.* Robertson Barclay. The entailer had confined himself to general words immediately following the last part of the prohibitory clause—'and if they *do in the contrary*, it is declared,' &c. The question was, whether these general words, in connection with the *special* consequence laid down, necessarily applied to everything within the prohibitory clause, or might be construed as being confined to the last member of that clause, with which they stood in immediate juxtaposition. It was held, as I understand the case in this point of it, that they did admit of this last construction, and that the words, 'if they *do in the contrary*,' 'all '*such debts and deeds* shall be intrinsically void and null,' were to be taken as limited in their application to the immediately preceding substantive prohibition—'nor to contract *debts*, nor do '*any other deed*, whereby' the lands might be evicted, &c.

Whatever opinion shall be formed of the present case, it cannot, in my apprehension, stand on the same ground with that of Lang. Even if the entailer had here rested on the general words in the beginning of the irritant clause, they are such that it would have been difficult or impossible to confine their application in the same way as the simple words 'do in the contrary' were confined in Lang's case. For they are, if I or any heir 'shall do anything in the contrary *of the said provisions*'—words which plainly relate to the whole limitations laid down. But the *irritant clause itself* here contains an enumeration of the cases to which these general terms were expressly meant to apply; and the very first is that of 'alienating or disponing.' The declaration of irritancy is express, that if the party shall act '*contrary to the provisions, by alienating or disponing*,'—in *that precise case* the consequence declared shall take effect. It is very true, that if the words in which that consequence is

expressed were not *in themselves* sufficient to comprehend deeds of alienation or disposition, there might be a failure from the want of apt and proper terms. But this would be quite different from the result obtained in the case of Lang, and must be rested on a different principle. And if, on the other hand, the words, or any of them, are in themselves sufficient for the case of alienation or disposition, which I apprehend they clearly are, it cannot in this case require or warrant a more limited construction of them, that the term *deeds* is necessarily connected with *debts* and *crimes*, in whatever order, with reference to the *other* cases of contravention in the enumeration; or that there is in that enumeration a general clause added to the contraction of debts, of doing any other deed, civil or criminal. The entailer has *expressly* said, that the consequence shall follow in all or any of the cases hypothetically assumed; and therefore, holding it to be clear law, that acts of alienation or disposition are comprehended under the term *deeds*, I cannot, without rejecting what appears to me to be the plain declaration of the entailer, come to the conclusion that this irritant clause does not effectually reach any act of alienation or sale.

In truth, the point as to the effect of the irritant clause in Lang's case could only have become of any importance, if the other point which occurred in that case, as to the want of a substantive clause against altering the order of succession, had been determined differently from the judgment regarding it. When it was decided, that there was no such effectual clause, and consequently that the heir in possession could at once extinguish the interest of all the substitutes, by a gratuitous act of alteration the effect of the irritant clause ceased to be of any practical consequence. Still the point was solemnly determined; and I have so considered it.

The case of Adam was of the same nature with that of Lang. But it appears to me to have been a stronger case in favour of the judgment; the general words—'all which debts, deeds, and

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'contractions'—plainly admitting of a fair application to the special class of debts or deeds immediately before mentioned, viz. debts or deeds *before the heir's succession*. There was, altogether, in that entail, an inaccurate disorder in the clauses, which fairly unhinged the entail on sound principles.

JAMES W. MONCRIEFF.

We concur in this opinion.

J. H. FORBES.
A. MACONOCHIE.
J. A. MURRAY.
H. COCKBURN.
F. JEFFREY.

In this opinion Lord Cunninghame ultimately concurred; and thereafter, in conformity with it, the Court pronounced the following interlocutor:—"26th February, 1842.—The Lords "having advised these actions, and revised cases for the parties, "with the opinions of the consulted Judges, sustain the defences, "dismiss the action and supplementary action of declarator, and "also the action of adjudication in implement: assoilzie the "defenders from the conclusions of the said actions, and decern."

The appeal was against this interlocutor.

Mr. Burge, Mr. Moir, and Mr. Anderson for the Appellant.—I. The resolutive clause does not apply to sales; the prohibition in the prohibitory clause is against selling, alienating, or disponing; each of these terms must receive a meaning and effect—selling speaks for itself—alienating, if used alone, might perhaps have been sufficient to include selling, but when used along with the word "selling," it has evidently a sense different from selling, and intended to embrace those methods by which alienation may be accomplished, other than by selling.

[*Lord Brougham.*—All are agreed that *alienate* will include selling, but the question is, if it will when selling is used along with it, and is subsequently dropped.]

Precisely. In using the three expressions "selling," "alienating," and "disponing," the entail follows the exact terms of the statute, which uses all three as expressive of distinct substantive acts, and not as synonymous designations of the same act. Alienation and disposition relate to deeds of conveyance, by which a right to the lands is given; but an heir selling, though he incur a personal obligation which may be the ground of adjudication, gives neither an alienation nor a disposition; the purchaser gains his entry not by any deed from the seller, but by entry with the superior. If, then, selling, in the language of this entail, as it is obtained from the prohibitory clause, be something different from alienating or disponing, to make the prohibition effectual, selling must be found also in the irritant and resolutive clauses, for in these clauses alienating and disponing are to receive the same limited construction given to them in the prohibitory clause, according to those principles which have been laid down in Speid *v.* Speid, 5 *Sh.* 619; Horne *v.* Rennie, 3 *Sh.* & *Mc. L.*, 143; Dick *v.* Drysdale, 16 *F. C.*, 460; Barclay *v.* Adam, *Hume*, 877; Lang *v.* Lang, 1 *Mc. L.* & *Rob.*, 871. In Hopetown *v.* Humbie, *Mor.* 15,505, no doubt it was held that a prohibition against disponing included one against selling, but that judgment never received the sanction of this House, and at all events the case was different from the present in this respect, that there *selling* did not occur at all, while here it does occur in the prohibitory clause, along with alienating and disponing. In the case of Elliott, 1 *Sh. App.* 17, it certainly was held that a prohibition to sell occurring along with disponing was fenced by an irritancy of *disponing* alone; but that decision would not now be consistent with those strict rules of construction which have since been laid down in Speid *v.* Speid, and Lang *v.* Lang.

II. The irritant clause is also defective, inasmuch as it does not apply to sales. It does not in terms apply to them, and the only word which constructively can by possibility have such an

application is the word "deeds." In the prohibitory clause, however, "deeds" is classed with crimes and acts of feudal delinquency, and is in a branch of the clause separate from that applicable to sales; and so in the irritant clause it appears in the same company. After speaking of crimes or delinquencies, it says, "the said deeds," which is plainly referable to the deeds immediately before spoken of, and this is confirmed by that part of the clause which declares that the lands shall devolve upon the next heir; it is here the nominative to the verb "done," the proper verb to be used in speaking of crimes and acts of feudal delinquency, and not to the verb "granted," which would have been the appropriate expression, if the making of legal instruments had been meant to be provided against.

The Lord Advocate and Mr. Moncrieff, for the Respondents, cited Hopetown *v.* Humbie, *Mor.* 15,505; Elliott, *Sh. App.* 97; Brown *v.* Dalhousie, *F. C.*; Queensberry *v.* Wemyss, 1 *Bligh*, 406; Adam *v.* Farquharson, 2 *D. B.* & *M.*; Lumsden *v.* Lumsden, 2 *Bell*, 104; Anstruther *v.* Anstruther, 2 *Bell*, 242.

LORD CAMPBELL.—My Lords, the question here is, whether the appellant is entitled to sell the lands of Cockspow, in which he stands invested under an entail which he has executed in pursuance of a private Act of Parliament, authorizing him to entail these lands as a substitute for the lands of Pitlochie, to which he had succeeded as heir of tailzie and provision. He has executed this entail in the terms of the Act of Parliament, and he is justified in asking a declaration of his power to sell, although he obtained the Act upon the supposition that, under such an entail, the power of sale did not exist.

He objects to the resolution and irritant clauses of the entail on three grounds,—1st, that they do not specifically apply to *selling*, although *selling* is specifically forbidden in the prohibitory clause; 2nd, that *sale* is not comprehended under the word

against the said provisions by alienating or disponing the lands, (words which we must now assume include *selling*), or do any other deed civil or criminal, "the said deeds" shall be void, &c. Now, I cannot doubt that the word "deeds" here includes selling and every species of alienation and disposition contrary to the provisions of the entail; and this construction is strengthened by looking to the language of the statute, 1685, and to the manner in which deeds of entail that have been established as valid, are constructed.

The Tillicoultry case and the others relied upon, proceed upon the principle, that general words of reference which would of themselves be sufficient, may be cut down by subsequent words of imperfect enumeration, showing that, according to the grammatical and natural construction, they were used in a qualified and restrictive sense. In this entail there is nothing to show that the general words relied upon should not have full effect given to them, unless the third objection should prevail, which I now proceed to consider.

Thirdly. It is said that deeds here cannot include *sale* or *alienation*, the entailer having declared his object merely to be that the lands should not be burdened in the hands of the heirs of tailzie. We cannot refuse to listen to this objection, although it was not taken in the Court below; but after mature consideration, I come to the conclusion that it was not urged sooner, because it was felt to be untenable. I know not that the entailer must be taken to express the whole of his object by the clause which he introduces with "so that," or that he intended to do more than state one consequence of the irritancy. But, at any rate, can it be doubted that by a *sale* the lands would be affected in prejudice of the succeeding heirs of tailzie and provision? After a written agreement to sell, the purchaser would have a specific remedy to take up his title to the land; and if there were at once a regular disposition to the purchaser, it is difficult to say that the land would not be *affected* by the deed which

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t it is sufficient if the *generic* word is introduced into the lutive and irritant clauses, for thereby the entailer has ex-ssed his intention by language which, in its grammatical and ural sense, without conjecture or doubtful inference, unequi-ally shows that the specific act expressed in the prohibitory se is included in the resolutive and irritant clauses.

Here, when the words "alienate and dispone" follow the d *sell* in the prohibitory clause, I think it clear that the ailer intended to use *generic* words, including an alienation or osition by *selling*, and therefore that the resolutive and tant clauses are directed against selling, being directed against lienating or disponing."

So I should have thought, my Lords, had the question been v; but the appellant's counsel admit that the very same ection was urged against the entail of Stobbs, in 1803, and s overruled. As that case was not brought by appeal before s House, we are not absolutely bound by it, but it has stood law during forty years. As a decision of the Supreme urts in Scotland, it received great countenance from this use in the Queensberry case, in the year 1821, and, in my mble opinion, it rests on sound principle.

Secondly. The next objection is, that the word "deeds" in irritant clause does not apply to *selling*. This word is most sible, for it may be confined to written instruments, or to dal delinquencies, or it may extend to all acts enumerated in prohibitory clause. Here it is a word of reference, and we st ascertain in what sense, according to the grammatical and tural construction of the language employed, it is used. The hibitory clause forbids the heirs of tailzie "to sell, alienate, or dispone," or "to do or commit any *other* fact or deed in pre-judice of the present tailzie, or those who shall succeed in virtue thereof," thereby showing that to sell, alienate, or dis-ne, was a *deed* in the contemplation of the entailer. Then he es on to say, that if the heirs of tailzie should do anything

against the said provisions by alienating or disponing the lands, (words which we must now assume include *selling*), or do any other deed civil or criminal, "the said deeds" shall be void, &c. Now, I cannot doubt that the word "deeds" here includes selling and every species of alienation and disposition contrary to the provisions of the entail; and this construction is strengthened by looking to the language of the statute, 1685, and to the manner in which deeds of entail that have been established as valid, are constructed.

The Tillicoultry case and the others relied upon, proceed upon the principle, that general words of reference which would of themselves be sufficient, may be cut down by subsequent words of imperfect enumeration, showing that, according to the grammatical and natural construction, they were used in a qualified and restrictive sense. In this entail there is nothing to show that the general words relied upon should not have full effect given to them, unless the third objection should prevail, which I now proceed to consider.

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defeats the destination in the tailzie, and carries it away from the heirs, who would otherwise have succeeded.

I am not surprised therefore to find the same words in other entails, which have been upheld after strenuous objections on other grounds, although this objection, which might have been taken, was not urged.

Upon the whole, my Lords, I am of opinion, that in this case the appellant has not power to sell the lands of Cockspow; and I humbly move your Lordships, that the interlocutors complained of be affirmed with costs.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend in the view which he takes of this case. I had myself prepared a judgment upon this case, in which I took precisely the same view of those three several objections to which he has adverted.

It is really in vain to contend that the words used here do not comprehend a sale in the one clause, after the authorities which are set forth in the Stobbs case, which has been acted upon in one or two instances, and which has been highly approved of for the last forty years and upwards. The objection is one upon which at first one might have been disposed to feel a little more doubt; but when one takes the whole structure of the sentence together, I do not think that any doubt whatever remains. "Deed" is a word of flexible import; it is not a word that has always the same meaning. Sometimes it may mean a fact or act—sometimes it may mean a feudal delinquency—sometimes it may mean an instrument—sometimes it may mean an act of service. In this case, according to the judgment which I had certainly formed, and in which I entirely concur with my noble and learned friend upon the authorities relied upon in this case, there is no doubt whatever that it is sufficient to support the view which has been contended for.

Now, my Lords, the last observation which I have to make,

refers to the argument which was urged very ably at the bar, and which had a great effect upon me at the time it was urged by Mr. Anderson, to show that there was a limitation by reason of the words "in so far," as imported into that sentence, and that those words affected what preceded it with a qualification. Now, that certainly at first did appear to some of us to require a little consideration. I had a communication afterwards with a learned conveyancer upon the subject; and the first thing which I found, certainly led me to hope that we should not find it necessary to adopt that argument, and to hold this clause to be affected by those apparently qualifying terms, namely, that it was the case in ninety-nine out of a hundred instruments of this description, in use, and held to be valid, and it would therefore have been a most frightful thing if we had been called upon at this time of day to hold a doctrine which would have shaken the titles under those instruments; but when we come to have the case thoroughly investigated, it seems quite clear that the true, the logical, and rational construction of these words do not at all import or affect the qualification in question of the preceding limb of the sentence. I am sure I need do no more than refer to the very able argument on this question by Mr. Moncrieff, one of the very ablest arguments, so able as to draw commendation and most just eulogy from every one who heard it. He appeared to me not only to deal with it in a very masterly manner in point of succinctness and acuteness, but also in a triumphant manner.

Upon these grounds I retain the opinion which I formed upon this case when I first considered it, and I join with my noble and learned friend in holding that the judgment ought to be affirmed.

LORD COTTENHAM.—My Lords, this is an appeal against a unanimous opinion of eight of the Judges of the Court of Session, Lord Cunninghame, who at first expressed a doubt, having

ultimately concurred with the other judges upon the first point, whether the resolutive and irritant clauses, which are combined, include the act of selling, under the terms "alienate and dispone," (the prohibitory clauses prohibiting the heir to sell, alienate, or dispone, and the resolutive clauses only declaring that the heirs shall forfeit, if they shall do anything contrary to the said provisions, either by alienating or disponing). I concur in the opinion of the Court below that the case is concluded by decisions of the Court of Session and of this House. In the case of Humbie, 1758, *Mor.* 15,505, the Court of Session held that a prohibition to dispone an estate implied a prohibition to sell. In the case of Elliot of Stobbs, May 19, 1803, the prohibitory clause prohibited selling or disponing, and the resolutive clauses contained only the word *dispone*. The declarator prayed a declaration that the entail was not good to prevent a sale, but the Court sustained the defences, holding the entail to be good. That was a much stronger case than the present, the word *alienate* being found in the resolutive clause in this entail, though not in that of Stobbs, but it was not the subject of appeal. In 1813 another question arose upon the same entail, and the question was whether the clauses applied to long leases. The Court of Session held that they did not, but the judgment was reversed in this House, Lord Eldon holding that the word *dispone* included a grant of a long lease. That long leases were included in the word *alienate* had been before decided in the Queensberry case. Granting a lease is a partial alienation or disponing of the interest in the land; selling is an alienation or disponing of the whole. To hold, therefore, that these words do not include a sale, though they have been decided by the House to include leasing, would be to hold that the leasing was more an alienation or disponing of the land than the actual sale, or, in other words, that the part was greater than the whole.

I think, therefore, that the resolutive clause includes the act of selling, although alienating and disponing are the only words used.

Upon the irritant clause, the question is, whether sales are included in the declaration of nullity; and keeping in mind that the words "alienate and dispone" include sales, I cannot think that any doubt can exist upon that subject. The "said debt, "deeds, crimes, and delicts, and all and every of them," are declared to be *ipso facto* null and void, and the question is whether selling, or alienating or disponing, constitute one of these deeds. To ascertain this, the sentence must be traced from its commencement, "and if I or any heir of tailzie, &c., "shall do anything contrary to the said provisions." Then comes the enumeration: "by alienating or disponing," which includes selling, "or contracting debts, or committing the crime of treason, "or doing any other deed, civil or criminal, the said debts, deeds, "crimes, and delicts shall not only *ipso facto* become null and "and void, so far as concerns the said lands." Debts and delicts are specified in terms; the only other matter before enumerated is alienating and disponing, which includes selling. To this, therefore, the word *deeds* must, in the strict construction of the sentence, be held to refer; there is no ground for holding that these words refer only to what immediately precedes them.

If this be the right construction of this sentence, that is, if the words "debts, deeds, crimes, and delicts" refer to and include all the matters before enumerated, the case of Lang v. Lang has no application to the present, that decision having turned upon the construction put upon the particular frame of the sentence in that case, namely, that the words "and if they "do to the contrary" referred to the words which immediately preceded it, and did not include all matters before enumerated which the words used in this case I think clearly do. The case of Adam was decided upon a similar ground. I therefore concu-

in the opinion that the interlocutor appealed from ought to be affirmed.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the Interlocutor, so far as therein complained of, be affirmed with costs.

G. and T. W. WEBSTER—GRAHAM, MONCRIEFF, and WEIMS, Agents.

[Heard 21*st March*. Judgment, 4*th September*, 1844.]

JOHN STIRLING, of London, and the RIGHT HON. ARCHIBALD LORD DOUGLAS, *Appellants.*

ROBERT EWART, Esq., of Allershaw, *Respondent.*

Superior and Vassal.—Non-Entry.—Tailzie—Found that a superior having granted a charter under the procuratory in a strict entail, and received a year's rent on the entry of the first party taking under the investiture, is not entitled to a similar payment on the entry of subsequent heirs of entail, not heirs of line of the party last entered, on the ground that they are singular successors; but that he can claim only the relief duty payable on the entry of an heir, and this notwithstanding the superior, at granting the first charter under the entail, may have inserted in it a clause declaring that the granting of the charter should not exclude his claim to a year's rent, whenever the heir asking an entry should not be the heir of line of the person last entered.

ON the 20th day of July, 1802, Grizel Ewart executed a disposition and deed of entail of her lands of Allershaw, whereby she granted procuratory of resignation for resigning the lands in favour of herself in life-rent, and William Cosser, her second cousin, and the heirs male lawfully to be procreated of his body in fee whom failing, to David Robertson Williamson Ewart, and the heirs male lawfully to be procreated of his body, whom failing, to Robert Ewart, grandson of Dr. Robert Ewart, and the heirs male lawfully to be procreated of his body, whom failing, to any person or persons to be named and appointed, in any nomination or other writing, to be granted by the said Grizel Ewart, at any time of her life.

In 1811 Grizel Ewart died; William Cosser then took up the succession under the deed, and on the 24th Nov., 1813, William Stirling, the superior of the lands, gave him a charter

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confirmation and resignation which proceeded on the pro-atory of resignation in the deed of entail, and conveyed the ds to him under the whole prohibitory, irritant, and resolu- clauses of that deed under a declaration in these terms, eclaring that by granting these presents, we shall not ex-lude ourselves or our heirs or successors from any claim hich we or they may have at law to a full year's rent of the nds herein contained, whenever the heirs of entail to whom he succession shall open shall happen not to be heirs of line f the person who was last entered and infeft by us or our oresaids."

Cosser, who was not the heir at law of the entailer, ob-ned this charter as a singular successor, and paid the superior his entry a full year's rent of the lands.

Cosser died without heirs male, and without having executed procuratory or precept in his charter, and he was suc-ded by David Robertson Williamson Ewart, now become rd Balgray, who was served heir of tailzie and provision, and October, 1818, took infeftment under the precept in Cosser's arter.

Lord Balgray died in 1837, without heirs male of his body, the succession then opened to the respondent, who, in gust, 1837, expede a general service as heir of tailzie and pro-ion to Lord Balgray.

In 1837 the appellants required the respondent to enter th them as superiors, and to pay the usual composition on the try of a singular successor. The respondent refused to pay ore than double the yearly feu duty, and thereupon the appel-nts brought against him a declarator of non-entry.

The appellants pleaded, in support of their action, that they ere not bound to give the respondent an entry as vassal, cept on condition of his paying a year's rent of the lands, d having refused to pay it, they were entitled to a decree of n-entry against him.

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The respondent pleaded that, as he had succeeded as heir of the existing investiture, he was entitled to an entry as such.

The Lord Ordinary ordered cases, and upon advising these papers, made avizandum with the cause to the Court, accompanying his interlocutor with the following note:—

"*Note.*—The Lord Ordinary reports this case as involving a "question long agitated between superiors and heirs of entail, "and which is now prepared for the consideration of the Court, "on papers of great research and ingenuity.

"The pursuers are undoubtedly superiors of the estate of "Allershaw. This estate belonged in property to Miss Ewart, "who, in 1802, executed an entail, whereby she destined it "under strict fetters, *first*, to William Cossar and the heirs-male "of his body, whom failing, to the late Lord Balgray and the "heirs of his body; whom failing, to the defender, Robert "Ewart and his heirs-male.

"Miss Ewart died in 1811, and was first succeeded by Mr. "Cossar, who got a charter in 1813, from the superior; but as "he was neither heir-male nor heir-of-law of Miss Ewart, Cossar "paid a full year's rent for his entry. The charter was qualified "with the *reservation*, inserted, it is believed, for upwards of "half a century in the greater part of tailzied fees, that the "superior, by the grant then made, should not be excluded from "any claim 'which we or our foresaids may have at law, to a "'full year's rent of the lands herein contained, whenever the "'heirs of entail to whom the succession shall open, shall "'happen not to be heirs-of-line of the person last entered and "'infeft by us and our foresaids.'

"Mr. Cossar did not take infeftment on his charter, and "having died in 1817, Lord Balgray was infeft on the precept "still unexhausted in the first charter. On Lord Balgray's "death without issue in 1837, the succession under the tailzie "opened to the present defender. It is admitted that the "defender is not an heir-of-line, nor in any way lawfully con-

"nected, either with Lord Balgray, or even with the entailer "Miss Ewart.

"In these circumstances, the tailzied fee having become "vacant, and the succession having opened to a stranger heir "and disponee, the question arises, whether the superiors are "entitled to demand a casualty of a full year's rent from the "defender? It is not a little remarkable that the present should "be the first instance in which this question has been presented, "free from any specialty, for the consideration of the Court, "since the well-known case of Lockhart and Denham in 1760. "Now that it has occurred, it is entitled, from its importance in "practice, to the most deliberate consideration.

"On a deliberate consideration of the whole case, the Lord "Ordinary must own that he finds it difficult to resist the argu- "ment of the defender, and the various authorities by which it is "supported. That indeed appears to be founded chiefly on the "view of the same question taken by Lord Corehouse, in a very "learned note attached to his interlocutor in the case of the "Duke of Hamilton against Baillie, reported in 1827 (6 *Shaw*, "p. 94). Though a specialty occurred in that case, sufficient for "the disposal of the superior's claim, his Lordship delivered his "opinion on the abstract question as to the superior's claim in "general, under a tailzied investiture, in terms which shewed "that he had very anxiously considered the point. The views "briefly indicated in that valuable note, are elaborately enforced "in the revised case for the defenders, the fulness and length of "which are amply atoned for by the able and satisfactory expo- "sition of the argument and authorities that it contains. The "Lord Ordinary shall now explain, as shortly as the nature of "the question admits of, the grounds on which he has come to "the conclusion, that the defender's plea is well founded in law.

"It does not seem necessary in the present inquiry to enter "into any disquisition on the original or early history of feus. "Although the general tradition is probably correct, that fiefs

" were originally granted by military adventurers to their fol-
" lowers, at first for life only, and afterwards to their heirs-male,
" it is notorious that, with us, feus have for many centuries been
" descendible to heirs whatsoever. *Reg. Majest.* B. ii. sec. 25,
" &c., &c.

" When rights of property became thus fixed and inheritable,
" the superior was of course obliged to enter the heir of the
" investiture on payment of the ordinary relief duty. Hope, in
" his *Minor Practicks* (tit. 4, sec. 21), describes the course which
" was competent to the heirs of vassals to compel subject-
" superiors to give this entry. A retour was expede, after which
" a precept issued from Chancery to compel the superior to enter
" the heir, and if he refused, the vassal was entitled to apply to
" the Crown for an entry.

" While these provisions, however, were early fallen upon
" for securing the descent of feus to the heirs of the vassal, the
" superiors had influence to preserve in force restraints on the
" alienation and transmission of land altogether prejudicial to
" the improvement and prosperity of the country. Although
" these limitations evidently arose from the original destination
" and purpose of feus, the reason for them ceased when these
" became hereditary in the families of vassals; but as their
" maintenance increased the casualties exigible by superiors, it is
" not extraordinary that they were continued in the earlier
" periods of our legislation, when the interests of commerce were
" of little importance and ill understood. But at length, in
" 1469, the Statute was passed allowing land to be comprised
" by creditors for debt, and obliging superiors to give an entry
" to the apprisers for payment of a year's rent. This (as ex-
" plained in the *Minor Practicks*, tit. v., sec. 16), indirectly
" enabled purchasers to change the old investiture and to com-
" plete their title, because they always had it in their power to
" comprise the lands for the price, and so to bring their case under
" the Statute. It is true that superiors had an option, by the

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" Act 1469, to take back the feu on paying the whole debts of " the vassal; but when the debts were large, or where the price " was adequate, a superior had no object, and often was not " able to exercise the option. In practice it does not appear " ever to have formed any serious obstacle in the attachment " and transmission of land, when apprisers were willing to " account fairly to the superiors for the year's rent.

" When creditors or purchasers raised and obtained a com- " prising under this Statute, it is supposed that they could com- " petently assign it to such persons, or their heirs and assignees, " as they chose. No authority is to be found for holding that a " new vassal appriser could not make the new investiture in " favour of such persons as he chose. More especially, there " appears to be no example of the superior being entitled to " name the heir of an appriser, and no principle of law was in " force in the fifteenth century, or after it, establishing that " apprisers could be limited in the selection of their heirs, or " forced to take a charter to heirs whatsoever instead of heirs " male, or to the latter instead of heirs of provision voluntarily " selected by him. The contrary is strongly indicated by *Stair*, " B. 2, t. 3, sec. 43.

" It is true that the remedies and rights of *creditors* and " *purchasers* apprising, do not apply to the case of stranger heirs " claiming under *mortis causa* settlements and tailzies of a de- " ceased fiar. But it is probable that such settlements, without " some arrangement and agreement with superiors, were not of " very frequent occurrence for many years after 1469. It was " only in 1540 that the practice of authenticating deeds by seal, " without the subscription of the party, was abolished, which " shews that skill in writing was not before very generally " diffused; and though it certainly appears from Balfour's *Prac-* " *ticks* (finished about 1580), that *tailzies* or destinations of a " certain description were known in his time, the inference " deducible from what he says is, that superiors, in general and

" in practice, accepted of new heirs without any hard exaction;
" probably from the consideration that the casualties payable by
" a new set of heirs would be as lucrative to the superior as the
" casualties from the old series.

" But, as the country advanced, the Supreme Court assumed
" such powers as were necessary to give effect, as far as possible,
" to all rights of property. Hence the process of adjudication
" before this Court seems to have been introduced at an early
" period, by *usage* alone, without the authority of any Statute.
" Accordingly, the Statute 1621, cap. 7, refers to adjudications
" against heirs lying out for debt, as a proceeding then in com-
" mon use in the Supreme Court; and it gives all co-creditors of
" the proprietor, as well as to the first adjudger, a right to
" redeem or require possession in the order of their adjudica-
" tions. At the same time this process before the Supreme
" Court was not limited, even at an early period, to adjudica-
" tions for *debt*, but came to be sanctioned for the enforcement
" of irredeemable conveyances. The earliest example of such an
" adjudication seems to be the case of Johnston *v.* Carmichael,
" in 1611, mentioned by Lord Stair, in treating of dispositions
" (B. III., t. 2, sec. 53), and various other cases occurred soon
" after, as appears from the *Dictionary* (p. 54, *voce* Adjudi-
" cations), in which the Court gave decrees of adjudication in
" favour of parties holding absolute and irredeemable conveyances
" to lands. Accordingly, at the time that Sir George M'Kenzie
" wrote his *Institutions*, he mentions adjudications as in general
" use before the Supreme Court, and especially refers to adjudi-
" cation in *implement* for making dispositions effectual; and adds,
" that 'the Lords will adjudge the lands disponed to belong to
" 'the pursuer a *remedium extraordinarium*, there being no other
" 'remedy competent. This adjudication extends no farther
" 'than to the thing disponed, and *hath no reversion*.'—*Institu-
" tions*, B. II., t. 1, 2.

" In that way, stranger disponees and heirs of provision had

"a compulsitor for obtaining infeftment from superiors, without "being liable even for a year's rent, by giving them a charge to "enter disponees on decrees of adjudication taken before this "Court, and as the Act 1469 applied only to parties following "the ancient course of *apprising* before the Sheriff, and not to "adjudgers before this Court, the superiors for a long time had "no authority for exacting a year's rent. This, however, was "remedied by the Act 1669, c. 18, which declared, that supe-"riors should be entitled to a year's rent for entry of all ad-"judgers, as well as apprisers; and from that period ad-"judgers, both for debt and in implement, before the Court of "Session, as well as creditors and purchasers apprising under "the old form, were held liable for a year's rent and no more. "This is clearly stated by Lord Stair as the rule, when his "*Institutions* were first published in 1681. As he says (B. II., "tit. 4, sec. 32),—'The Statute (1469) was by custom extended "'to adjudications, being the same in effect, but different in form "'from apprisings; for the design of the Statute being to satisfy "'creditors by judicial alienation of the debtor's lands *ex pari-*"*tate rationis*, it was extended against the debtor's appearand "'heir, who being charged to enter heir, did not enter; and "'therefore lands were adjudged from him, to which he might "'have entered, either for his predecessor's debt or his own; "'whereupon the superior is decerned to receive the creditors "'adjudgers, whether for sums of money, or *for implement of* "'*dispositions and obligements to infeft.*' But the custom allowed "'not a year's rent to superiors for receiving adjudgers, 21st "'July, 1636, Grier., till the year's rent was also extended to "'adjudications by Act of Parliament, *Dec.* 3, 1669.'—See first "edition of *Stair*, vol. 1, p. 305.

"Thus, in practice, all vassals were enabled, long before "1685, to change the old investiture of their estates, and to "establish a new investiture under the superior, by paying him "a year's rent. That high composition was the utmost extent

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" of the superior's claim for changing the investiture, and there " is no indication in any of our authorities, that superiors, after " the rights of property and inheritance were well understood, " had any control over vassals in the destinations they made, or " in the number of substitutions under which they chose to " settle their fees. The limitation necessarily imposed on vassals " consisted in this, that substitutions (which truly are special " assignations), fell all to be fixed *before infeftment*.—See *Stair*, " B. II., t. 3, sec. 5.

" Indeed, the ancient custom and the right of vassals to alter " subsisting destinations and tailzies, and to make new ones, is " mentioned very clearly by Balfour in a chapter before referred " to (pp. 173, 174). It is well known, also, that the same " doctrine has been confirmed by more recent cases of unques- " tionable authority, as in those of Captain Johnstone against " the Marquis of Annandale, in 1759 (*Dict.* p. 4356); and in " that of the Magistrates of Aberdeen against Burnett in 1808 " (App. *voce* Superior and Vassal, No. 5), both referred to " in the papers in the present case. And therefore, when a fee " was once settled, and an entry given for the usual composition " under a new investiture; the substitutes became heirs of pro- " vision, and in fact *members of the investiture*, and the superior " could demand no more for the entry of any succeeding substi- " tute than the ordinary relief duty exigible from heirs of inves- " titure.

" These views are not inconsistent with the doctrine of Craig " and others, that tailzies could only be made *with consent of the* " *superior*. In one sense this was correct. Heirs of tailzie not " *alioqui successuri*, certainly could not demand an entry as *ordi-* " *nary heirs*, without the consent of the superior. But some time " elapsed in the early history of the law, before the operation and " effect of the process of adjudication, whereby heirs of provision " and disponees could compel an entry from the superior, under a " new institution, on an absolute and irredeemable disposition,

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" ' were well ascertained. Craig (whose treatise was published in " ' 1602), expressly states that that process was unknown to his " ' predecessors, and Lord Stair observes (B. III. t. 2, sec. 45), " ' that 'adjudications being but recent in his (Craig's) time, and " ' ' few decisions thereupon, the nature and effect of it was but " ' ' little known, but is now in course of time farther illustrated.' " When it was afterwards found, therefore, that adjudgers had it " in their power to obtain an entry by payment of a year's rent, " it is not strictly correct to say that a tailzie could not, at least, " *by due process of law*, be made effectual without the consent of " the superior. Indeed, the competency of an adjudication by " heirs of tailzie, is distinctly explained by Lord Stair (B. II., t. " 3, sec. 43.)

" The Act 1685, giving validity to entails, certainly did not " extend the rights of superiors. The object of it was to secure " and render permanent the tailzied destinations in previous use, " by giving effect to prohibitory, irritant, and resolutive clauses, " but while it declared that superiors *should not be prejudged* of " their casualties, it did not enact that any new casualties should " be leviable from heirs of tailzie, which could not have been " demanded from heirs of investiture, according to the former " practice.

" It would appear, however, that superiors and their agents, " very soon after 1685, took up the notion that they might set " up a claim for a composition from every substitute of tailzie who " was not heir-at-law of the preceding possessor of the estate. " Accordingly, a clause to that effect was inserted in a charter " granted soon after 1711, by Mr. Lockhart of Carnwath to Sir " Archibald Denham of Westshiell (the first substitute under " the tailzie), though on every occasion the superior got a com- " position from the vassal as a singular successor. That charter " was reduced on a ground immaterial in the present question; " but the next substitute, Sir Robert Denham, got a new " charter in the same terms, the superior being allowed to retain

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" *the old composition.* Then, when a third renewal of the in-
" vestiture was required in 1760, in favour of the substitute who
" then succeeded, he not being the heir *alioqui successurus*, the
" superior demanded a second composition, which the Court
" repelled, ' in respect the pursuer had acknowledged the entail
" ' by granting charter and infeftment thereon to the late Sir
" ' Robert Denham.'

" It rather appears to the Lord Ordinary, that the real mean-
" ing of the Court in the preceding decision has been sometimes
" misunderstood, perhaps because the *ratio* set forth in the inter-
" locutor is not expressed with due acouracy and precision. It is
" not easy to understand how a superior could be said to have
" acknowledged an entail, merely by granting a charter contain-
" ing the very express reservation, which appears on the face of
" both the charters in the Westshiel's case; but when it is
" attended to that the superior had, prior to granting the first
" charter, received the *composition of a singular successor*, for the
" entry and acknowledgment of the first heir under the tailzie,
" he was thus properly barred from claiming a new composition
" from a succeeding heir of the *investiture*, which he had already
" acknowledged for the highest legal consideration that the law
" gave him a right to exact. In other words, he had acknow-
" ledged the entail for an onerous consideration; and no reserva-
" tion could give him any farther claim; as it was on its face a
" reservation of a demand plainly illegal and unjust, and not
" effectual against heirs of entail, as they did not represent the
" party who had acquiesced in its insertion in the primary char-
" ter. In that view, the case of Denham is an authority
" decisively in favour of the defender in the present case.

" It is obvious also, that the late cases are not opposed to
" the preceding decision. In the case of M'Kenzie, in 1777,
" the heir of entail who demanded an entry, being the heir
" *alioqui successurus* of the party deceased, refused to pay the
" composition of a singular successor; and the Court held that

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"' he was entitled to an entry for the ordinary relief duty of an "' heir, 'reserving to the superior and his successors in the supe- "' 'riority, any right which they may have to a year's rent on the "' 'entry of any future heir of tailzie *not an heir* of investiture "' 'prior to the tailzie.' It is almost implied in this reservation, "' that the payment of a composition by any substitute of entail " as a singular successor, would exhaust the claim of the supe- " rior, as the tailzied destination would then be acknowledged by " him for the legal consideration exigible on a change of investi- " ture. Accordingly, in the deliberations on the Bench, in " M'Kenzie's case, Lord Braxfield made this important observa- " tion, that 'the granting of the first charter is an enfranchise- " 'ment of all the subsequent disponees.'

" The case of the Duke of Argyll *v.* Lord Dunmore, in 1798 " (*Dict.* p. 15,068), was certainly different from the preceding; " for there the institute of tailzie who demanded an entry was " confessedly a *singular successor;* and having offered the year's " rent, he was entitled, according to the view of the law now " taken, to insist on an unqualified entry of the whole tailzied " destination; but as Lord Dunmore, who then demanded an " entry, had a family of his own to succeed him, he was probably " advised that the superior's contingent claim might never arise, " and therefore he declined to try the question, farther than to " insist on the superior's future claim being *reserved*, in case it " should ever emerge; and the Court found that the superior was " not entitled to demand more at that time, in consequence of " which the determination of the question which here occurs, was " of course superseded.

" The late case of the Duke of Hamilton against Lord Hope- " toun (8th March, 1839), is also referred to in the present ques- " tion; and certainly there are some expressions, in the opinion " of the consulted Judges in that Report, which at first sight " might afford an inference in favour of the superiors' argument " here; but truly the plea now raised was altogether unneces-

" sary in that instance. The superior had granted a charter in " the ordinary terms to a purchaser, and his heirs and *assignees*. " No special substitution was set forth in the charter; but the " vassal having got the charter in the preceding general terms, " assigned it in his son's contract of marriage to his heirs male " and other heirs of tailzie, excluding heirs of line. As the " superior was not a party to the assignation, it was contended " that he had given no consent to the new investiture, and was " not bound to give a new investiture under it, without a new " composition. But it was held sufficient for the determination " of the case, to state that, in any view of a superior's right, a " purchaser was entitled to substitute all his own heirs in any " order he chose, without the superior's consent. The question, " whether he could not have insisted on a new investiture being " granted to any series of heirs of provision he chose to substitute, " at the very time the charter was taken out, was of course not " decided by the Court, but was reserved for consideration when " the case should occur.

" Now, however, that the question arises under circumstances " which render its decision unavoidable, the Lord Ordinary, on " the grounds already detailed (perhaps at too much length), is " humbly of opinion, that the superior having already received a " composition for the entry of the first disponee under the present " tailzie, and having thereby acknowledged the entail for an " onerous cause, is bound to enter the defender as an heir of the " subsisting investiture, for the ordinary relief exigible from an " heir.

" The Lord Ordinary has the less hesitation in coming to " this conclusion, when it coincides so entirely with the opinion " expressed by Lord Corehouse in the case of Baillie in 1827, " before referred to. His Lordship remarked, most properly in " that case, that if superiors were entitled to a casualty in every " transmission of a tailzied fee to a stranger substitute, 'it would " ' make a tailzie greatly more preferable to a superior, than a fee

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" ' simple.' It may be added, that when a proprietor, by follow-
" ing out implicitly the directions of the Act 1685, may make the
" tailzied fee perpetual in his own family, or to his own kindred,
" by a destination to the vassal, and his heirs whatsoever, always
" secluding heirs portioners, it is very difficult to see how the
" condition of the superior can be made worse by any special
" substitution of stranger heirs, any more than it would have
" been by the perpetual inheritance of the heirs-at-law.

" It deserves notice also, that the Act of Geo. II. enabled
" vassals to change their old investitures, by executing procura-
" tories of resignation in favour of such disponees as they thought
" proper, on which they were entitled to give a charge to the
" superior to enter them on payment of the customary casualties
" exigible from the heir or purchaser. If the charge was in
" favour of a singular successor, and a specified series of substi-
" tutes *in fee simple*, it never was supposed that the superior
" could object or claim a new composition from any of the substi-
" tutes allowed to succeed under a simple destination unfenced with
" irritant and resolutive clauses. There appears to be no pretence
" for such a claim under the ancient law of Scotland. Is the
" claim, then, the more maintainable that the institute under a
" tailzied investiture, purchased from the superior, has succeeded
" by the protection of irritant and resolutive clauses? There
' appears to be no room for any distinction.

" This certainly raises the question suggested towards the
" close of Lord Corehouse's note in Baillie's case, whether the
" superior is not entitled to ' an equivalent for admitting a con-
" ' dition into the charter *which destroys the chances of singular*
" ' *succession in* future;' while his Lordship most naturally adds,
" ' that it is very difficult to put a value on that chance.' It
" humbly appears to the Lord Ordinary, that any claim of the
" superior on this ground is altogether inadmissible and con-
" trary to principle. It is established by the writings of all the

" great lawyers of the seventeenth century (including Hope, " M'Kenzie, and Stair), that tailzies, at least with prohibitory " clauses, and often with irritant and resolutive clauses, were " known long before 1685. These conditions laid the vassals " under a certain obligation, in honesty and good faith to respect " the tailzie, and they were effectual against gratuitous alienation, " though possibly not sufficient to exclude the claims of creditors; " the superior was also bound to insert these prohibitions in his " charter, it being remarked by Lord Braxfield, in M'Kenzie's " case, that a superior 'was always obliged to grant a charter " ' with *prohibitory clauses*.' This being the case, it would be " alike anomalous and unusual to give superiors a compensation " to any extent, merely because a law was passed making prohi- " bitions long sanctioned, and held obligatory *inter hæredes*, more " operative and secure, it being quite clear that vassals were pre- " viously entitled to frame such prohibitions, and that superiors " *ab antiquo*, were bound to repeat them in their charters. In- " deed, when an investiture of old was once established under a " superior, the principle and bearing of the feudal system was, " rather to retain the vassal and to maintain the rule *de non* " *aliendo*, than to enable the superior to make a profit by its " violation.

" This point was briefly adverted to in the opinion delivered " by the Judges in the late case of the Duke of Hamilton against " Lord Hopetoun, already referred to. The consulted Judges " stated, that they were 'not aware of any ground on which a " ' superior can be held bound to admit clauses irritant and reso- " ' lutive into the investure on payment of a composition or " ' casualty of one year's rent, or on which he can claim such a " ' casualty on account of having admitted such clauses.' But it " was added, that the claim of the superior on that ground was " excluded by the form of that action, and if so, it is equally " incompetent in the present case.

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" In every view, therefore, if the Lord Ordinary had given " his own decision in this case, he would have been disposed to " sustain the pleas of the defender."

The Court, after hearing counsel, ordered the cases to be laid before the other Judges for their opinions, which were delivered in the following terms:—

" We are of opinion that the pursuer is bound to enter the " defender upon the terms offered by the latter, viz. on payment " of *a year's feu duty* in name of *relief* as in the ordinary case of " the entry of an *heir;* and that he is not entitled to demand a " *year's rent*, in name of *composition*, as in the case of the entry " of a *singular successor*.

" We come to this conclusion upon the general ground, that, " where the superior, as in the present case, has already received, " upon the *change of investiture*, the composition of a year's rent " at the entry of the first member of entail not being heir of the " *previous investiture*, he is bound throughout to deal with the " entail as the *existing investiture* of the estate; and to carry out " and give effect to the destination therein contained, as *the rule* " *of that investiture* in regard to *succession*,—and consequently " to receive the whole series of substitute heirs (*without distinc-* " *tion of one from another*), as the line of succession thus fixed " respectively opens to each in the express character, and as " entitled to all the privileges and rights of *heirs of the investiture*.

" In other words, we adopt unqualifiedly the doctrine of " *Erskine*, II. 7, 7, as a correct statement of the rule of law " applicable to this question; that 'though singular successors, " ' whether adjudgers or voluntary purchasers, are liable in pay- " ' ment of a year's rent to the superior for changing the former " ' investiture; yet, where a proprietor entails his lands, the " ' superior is not entitled to the composition of a year's rent " ' from every successive heir of entail, who is not heir of line to " ' him who stood last infeft, on pretence that he is a singular " ' successor. *The heir of the last investiture cannot be called*

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" ' *a singular successor*, and he is founded in a right to demand " ' an entry, upon payment to the superior of the sum due to " ' him by law, in name of relief, upon the entry of an heir.'

" Accordingly, had it not been for *the clause of reservation*, " which the superior in the present case inserted in his charter of " resignation, it is altogether indisputable that every successive " heir of entail, whether heir of line to him who stood last infeft " or not, must have been received and entered upon this footing. " The pursuer himself concedes this. It was for the express " purpose of avoiding such a result that the clause of reservation " was resorted to. And it had been the same in all the former " cases: For example,

" In *Lockhart v. Denham*, 10*th July* 1760 (*Dict.* 15,047), the " Court, even in the face of an express clause, which, if the report " be correctly stated, had been embodied in the charter, ' that " ' every heir of entail shall be *obliged* to pay a year's rent for his " ' entry, unless he be at the same time heir of line to the person " ' who died last vest and seized :' ' FOUND, that, in respect the " ' pursuer had acknowledged the entail, *by granting charter and* " ' *infeftment thereon*, he was obliged to enter the defender *as* " ' *heir of entail*, and not as singular successor.'

" So, in *M'Kenzie v. M'Kenzie*, 4*th July* 1777 (*Dict. v.* " *Superior and Vassal, Appendix, No. II.*), the Court, doubting, " it is true, whether the judgment in Lockhart's case might not " perhaps have gone too far, in refusing effect to the clause just " quoted (which, in one sense, it might be contended, was made a " positive condition of the new investiture, and as such, while it " remained unreduced, ought to have received effect against all " claiming right through that investiture), had still no hesitation " as to the general doctrine,—That, were the entail once to be " embodied in any charter to be granted by the superior, *without* " *some express clause qualifying this recognition, and reserving the* " *superior's rights*, the whole series of substitute heirs—no matter " how much strangers in blood to each other—must become from

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that moment *heirs of the investiture*, and *quâ* such would be entitled to an entry, not as singular successors, but *as heirs*. In point of fact, in this case nothing was *decided*: and in order to solve the difficulty, the question was *kept open* for future discussion. But a reservation—saving the legal rights of both superior and vassal—was inserted in the judgment, just because the Court felt that *otherwise* an unqualified charter would, by *force of the law itself*, entitle a *stranger* to enter *without paying a composition*.' Indeed nothing can be more instructive on this head than the words of *Braxfield*, as they are reported by *Hailes*. 'QUERY—May not the superior throw in a reservation? If he does not, he cannot afterwards claim; for the granting of the first charter is *the enfranchisement of all the subsequent disponees*.'

"The case of *Duke of Argyle v. Earl of Dunmore*, 19*th November*, 1795 (*Dict.* 15,068), is to the same effect. The superior there insisted, that it should be made an absolute *condition* of the entail investiture, 'that he should not be obliged to enter such of the substitutes as were not heirs male or of line to the vassal last entered and infeft, without receiving a year's rent from them, as singular successors also;' and he did this, '*because*,' as he argued, after acknowledging an entail, '*by granting a charter upon it*, although it contained the reservation proposed by the defender,' (one similar to that in Mackenzie's case,) 'he would be *precluded from making his present claim*.' But the Court refused what the superior thus demanded; and 'in respect the reservation proposed by the vassal leaves the question entire when it shall occur,'—ordained the charter to be given upon that footing.

"At last, the precise question occurred, under a charter, which had been granted without any special clause, either of reservation or obligation, in the superior's favour: *D. Hamilton v. Baillie*, 22*d Nov.* 1827 (6 S. D. 94.) The superior endeavoured to shake himself rid of the implied recognition, by

" pleading that the charter had been granted *a non habente potes-*
" *tatem* to that effect, and that he did not represent the granter,
" —but this again was met by the answer, that the investiture
" had since stood unchallenged for more than forty years, and so
" was fortified by prescription :—and the Court had to dispose of
" the point immediately before it, as if the charter had been
" validly granted from the first. It was held that the entail
" having been *simpliciter* recognised, and embodied into the
" investiture, the superior, who had ' refused to receive as his
" ' vassal a party claiming entry as an heir of entail under the
" ' charter—*except in the character of singular successor*, and on
" ' payment of a year's rent,—*was bound to enter him as heir*.'

" Whether, therefore, the superior may at first refuse to grant
" a charter embodying a tailzied destination,—or whether, grant-
" ing it, he may be entitled so to qualify the right, as to leave it
" open to him afterwards, to insist, on a departure from the direct
" lineal line, for all that he might competently have demanded,
" had he originally refused,—may or may not be made a ques-
" tion. But it is settled law,—as regards every charter wherein
" the tailzied destination shall once unqualifiedly have been
" embodied—that under that destination, all are to be received
" as *heirs*, and that no distinction whatever can be taken among
" those heirs, as being, some, *heirs of line*, and some, *strangers*,
" to the vassal last infeft—the investiture alone affording the
" rule of succession in the fee—and all being alike *heirs of the*
" *investiture*.

" Without proceeding farther, then, we think this sufficient of
" itself to expose the whole fallacy of the pursuer's reasoning,
" inasmuch as his argument appears to assume throughout, that,
" whoever is not an *heir of line*, must, of necessity, in the eye of
" law, as applied to the constitution and construction of feudal
" rights, be regarded and dealt with as if he were a *singular*
" *successor*. The truth is, that in feudal succession, the very
" question, Who is heir *of line?* can never to any practical effect

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" arise, unless where the feu-right itself is conceived in favour of " heirs of that class. The essential question always is, Who is " heir of the *investiture*? Indeed, even where the investiture is " in favour of heirs of line, it is only as being heirs of the inves- " titure thus conceived, that the heirs of line themselves succeed.

" Nor is it out of place here to remark, that this view of the " matter seems also to dispose of the pursuer's argument, upon " the supposed reservation of the superior's rights as connected " with the present question, contained in the statute 1685, intro- " ducing and authorizing strict entails. For, if it were, indeed, " *ex statuti*, that the superior's rights were saved, it could require " no special clause of reservation, *ex pacto privato*, to be engrossed " in the tailzied investiture in order to work out that end. In " such case, a clause of this kind would be mere supererogation. " The entail itself, as it is constituted into a legal right only by " force of the statute, must of necessity have carried the statutory " reservation along with it, as parcel of the right, if not, indeed, " an express condition of its existence. Since, therefore, the law " holds that, notwithstanding the statutory reservation, there is " nothing whatever saved to a superior, who simply obeys the " statute by giving a charter unqualified *in grœmio*, it follows, " that it is not by force of the statute, but by force of some " express clause embodied in the writ,—in other words, by the " positive private stipulation of the parties *inter se*,—that the " superior's rights in this respect are to be saved, if, indeed, he " have any legal rights belonging to him in the matter.

" This brings the whole question to the point,—Is or is not " the superior entitled to refuse a charter, where the vassal " demands an investiture entailing the feu?

" In the *first* place, there is nothing in the mere circum- " stance of the estate's being settled *under the fetters of a strict* " *entail*, which entitles him to refuse. The entail may be fenced " in the most effectual manner with all the clauses authorized by " the act 1685, and, *provided the destination do not extend beyond*

" *the body of lineal heirs*, the superior has no choice. This the " pursuer concedes; and it is the necessary consequence, besides, " of all those cases, wherein the superior has been ordered to " embody the tailzied destination, with no other reservation but " one affecting the succession of substitutes, who appear to be " *strangers* to the direct line. As laid down by Braxfield in " *Mackenzie's* case, 'strip the deed of substitution to *strangers*, and " '*the superior might be obliged to grant a charter, even with* " '*prohibitive clauses*, &c. The superior does not suffer by the " 'line of succession being continued.'

" Nor is this the case only, where the direct lineal line of suc- " cession is preserved. The destination may even be broken in " favour of *strangers to this line*,—and still, if the destination thus " broken and interrupted in favour of strangers was also the des- " tination of the *prior investiture*, it may be changed from a " fee-simple to a strictly fenced entail destination,—and (as was " substantially decided in Mackenzie *supra*) the superior be " obliged to grant a charter *in terminis*, and to receive even the " stranger substitutes as the *heirs* of investiture, notwithstanding " the change effected through the fee's being now constituted into " a proper tailzied fee.

" But, if it be thus true, that the superior's right of refusal in " no respect depends upon the circumstance, that the estate has " been tied up from future alienation, by the fetters of a strict " entail, it must be upon some ground wholly apart from the " operation of the statute 1685, that that right, if such indeed " there be, must rest. In other words, it must rest upon some " ground, applicable not less to an ordinary destination in favour " of *heirs of provision* before the statute, than to the most strictly " fenced and protected destination in favour of *heirs of entail* " since.

" This would, indeed, give a very large and indefinite opera- " tion to the principle contended for by the pursuers. For it " would just come to this, that wherever—no matter whether by

"' strict entail, in fee simple, or under clauses merely prohibitory "' and therefore defeasible at pleasure—the legal order of succes- "' sion should come to be in the slightest degree broken in upon, "' the superior might reject the destination as an encroachment on "' his feudal rights, and refuse a charter.

" It is difficult to conceive that so very broad and wide- "' spreading a principle as this should have been the law, and a "' question for the first time come to be stirred in regard to it, "' under the Statute 1685. Conjunct fees,—destinations to heirs "' of a marriage,—the succession of heirs of provision generally, "' —in short, every case where land came to open in favour not "' of the *hæres natus*, but the *hæres factus*, must equally have "' raised the question under this more general aspect. But we "' are not aware of a single instance, among all these classes of "' cases, where a mere departure in the destination from the "' direct lineal order of succession was ever set forward as a ground "' entitling the superior to refuse a charter.

" The principle, indeed, is excluded by that very case of "' *Duke of Hamilton v. Earl of Hopetoun*, *8th March*, 1839, with "' reference mainly to the bearing of which the present consulta- " tion has been thought necessary. It was there expressly laid " down in the opinions, that, 'a purchaser of land from the vas- " ' sal of a subject superior is entitled, on payment of a casualty, " ' or composition of one year's rent, to obtain from the superior " ' a new charter, and a precept of sasine of the fee. This char- " ' ter and precept, we think, he is for that composition entitled " ' to demand, shall be granted in favour of himself and all his " ' heirs-at-law, in any order of these heirs he pleases, provided " ' only he shall not in this destinction go beyond his heirs-of- " ' law to strangers. He may equally name to the superior heirs- " ' of-law simply, or heirs-male, whom failing, heirs-female, or " ' any other arrangement of the body of his heirs-of-law.'

" It is very true that the opinion thus delivered is qualified " by the proviso that the vassal 'shall not in this destination go

" ' beyond his heirs-of-law to strangers.' But this, it is thought, " must be held to have been introduced merely to save and keep " open a case which was not at the moment before the Court. " The particular destination there to be dealt with was one which " did not go beyond the body of the heirs-of-law, and it was of " course right to confine the judgment to the individual destina- " tion on which the question had arisen.

" The important consideration, as regards the judgment " actually pronounced is, that it completely negatives the pur- " suer's main position in the present case, viz., that the superior " is entitled to refuse a charter, wherever the destination calls " the substituted heirs in other than the *direct line of blood*,— " and this upon the general principle, that every one who would " not take *as an heir* in the common order of law, must of " necessity be dealt with *as a singular successor*.

" In this respect, indeed, we can recognise no distinction " whatever, *in point of principle*, between a departure from the " legal order of succession within ' the body of heirs-of-law,' and " a corresponding departure by going out of that body. If the " pursuer be right in his argument, that a substitute heir, who is " not heir of line to the last entered vassal, must be held a sin- " gular successor, because the destination in such a case substan- " tially operates *a conveyance* from the last heir, and is not in the " proper sense to be dealt with as at all a legal *succession*—this " applies in its full force wherever the order of law is broken in " upon in the least degree. If a father *convey* to a second or any " younger son,—or one of several brothers to a sister,—the dis- " ponee, in such case, must enter and pay composition as a singu- " lar successor, although ' within the body of the granter's heirs " ' of law.' So, if a father or brother in the two cases supposed, " take a grant to himself in the first instance, whom failing, to " the second or younger son in the first case, or to the sister in " the second,—the substitute in this destination could not, of " course, though within the general body of heirs of law, take as

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" heir of line to the last entered vassal; and the *legal* order of " succession would just be as much defeated,—and the necessity " (*but for the destination in the investiture*) of a fresh deed of *con-* " *veyance* to carry the estate over the proper heir of line would " just be as palpable,—as if the destination in its second branch " had been in favour of a total stranger to the blood. But had " this departure from the line of blood been effected by *conveyance*, " instead of being brought about by the operation of the *investi-* " *ture*, as a destination once for all, the superior must have had " his composition as from a singular successor: and so on to the " end, wherever the direct line was at all or to any effect departed " from. Now the judgment in Lord Hopetoun's case authorita- " tively excludes this, in every possible variety of case, but the " single one of introducing a stranger. The superior's right, " therefore, cannot turn upon the distinction of *heir* and *singular* " *successor* in the sense that the pursuer contends for. Yet put- " ting aside that distinction, what legal principle is there, which " discriminates between a singular successor *within* the line of " blood, and a singular successor *out* of that line?

" Accordingly, we have the authority of Lord Stair, where he " treats of tailzied destinations, such as they were known before " the statute 1685,—for holding, that the superior could not pro- " tect himself against them by refusing a charter. Indirectly, and " by force of adjudication, any destination whatever could be " forced upon him. If 'the debt and decreet whereupon the " ' same proceeded, be conceived in favour of *heirs of tailzie*, in " ' that case the apprising or adjudication and infeftment thereon " ' *must be conform*' (*Stair* 2, 3, 43.) And again, (§ 59), 'It is a " ' general rule that *quisque est rei suæ moderator et arbiter*, every " ' man may dispose of his own at his pleasure, either to take " ' effect in his life, or after his death, and so may provide his " ' lands to what heirs he pleaseth, and may change the succession " ' as oft as he will, which will be completed by resigning from " ' himself and his heirs in the fee, in favour of himself, and such

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" ' other heirs as he pleaseth to name in the procuratory, where-
" ' upon resignation being accepted by a superior, and new in-
" ' feftment granted accordingly, the succession is effectually
" ' altered; yea, any obligement to take his lands so holden, will
" ' oblige the former heirs to enter, and to denude themselves for
" ' implement of that obligement, in favour of the heirs therein
" ' expressed; and if the superior refuse to accept the resigna-
" ' tion, or to give confirmation, there will follow an adjudication
" ' for implement of the disposition, which is ordinary, and there-
" ' upon the superior *must receive* the *adjudger;* so that the first
" ' constituter of a tailzie, or any heir succeeding to him, may
" ' change it at their pleasure.' That this did not mean heirs
" of tailzie merely within the line of blood, is made clear by
" another passage a little farther on in the section last quoted,
" where his Lordship speaks of ' a tailzie of a sum of money, lent
" ' in these terms, " to be paid to the creditor and the heirs of
" ' his body; whilks failing, to the father and heirs of his body;
" ' *whilks failing, to a person named,* and his heirs and assignees
" ' whomsomever." '

" We are therefore of opinion—1*st*, That independently of the
" statute 1685, the superior was not entitled to refuse a charter,
" though demanded in favour of heirs of provision, or such
" tailzied destination generally as the law then recognized; 2*d*,
" That the introduction of strict entails by that statute, made no
" difference in this respect, the superior not being entitled, where he
" would otherwise have been compellable to embody the destina-
" tion in his charter, to refuse doing so merely because of the
" fetters of entail; and 3*d*, That from the moment the destina-
" tion came thus to be embodied in the charter, and thereby be-
" came the rule of that investiture *quoad* the succession, every
" substitute within the destination became thenceforth an heir of
" the investiture, and as such, whether heir of line of the last
" entered vassal or not, was in all cases alike entitled to an entry,

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" not upon payment of composition as a singular successor, but " upon payment of relief merely, as in the case of a proper heir.

" J. IVORY.
" H. COCKBURN.
" JOHN A. MURRAY.

" I concur in all the views expressed by Lord Ivory on this " question; and beg to add, that it humbly appears to me that " his Lordship has obviated satisfactorily the argument founded " on the *reservation* of the superior's rights, inserted in the char- " ter granted to the *first* vassal, who was entered under the pre- " sent tailzie, after the form suggested by Lord Braxfield in the " case of M'Kenzie, and allowed by the Court in the case of " Argyll, and adopted in practice in other modern instances.

" It is clear, as observed by Lord Ivory, that such a clause " cannot have any other or more extensive effect than to reserve " the rights of the superior, as they stand reserved by the saving " clause at the end of the act 1685, which provided, that 'no- " 'thing in this act shall prejudge his Majesty, or any other " 'lawful superior, of the casualties of superiority which may " 'arise to them out of the tailzied lands.'

" This reservation it is thought imported no more than a " saving of such rights as superiors had *prior to the act.* No *new* " right was given to superiors. Their subsisting and ancient " right, as it existed *before* the passing of the statute was recog- " nised. But the whole authorities prior to 1685, concur in " declaring; that old vassals could at that time, by adjudication, " if not by the acceptance of the voluntary composition by the " superior, establish the validity of any new investiture he chose " to make of the fee, by paying a year's rent to the superior. " Still, in order to preserve that casualty, the reservation at the " close of the act 1685 was proper. As tailzied investitures were " then expressly sanctioned and declared to be effectual by " statute, a plea might possibly have been set up, that superiors

" were bound to acknowledge tailzied investitures even when " the first entry under them was demanded, without payment of " the casualty previously exigible. The reservation in the act " 1685, effectually excluded that plea. But when no new additional " privilege or casualty was given to superiors by the statute, it " follows that they were not entitled to demand more subsequent " to 1685, than they could have legally exacted by the previous " law and practice, for the entry of heirs under tailzied substitu- " tions and investitures.

" J. CUNINGHAME."

The following are the opinions of Lords Mackenzie, Jeffrey, and Gillies; of Lord President Boyle, and of Lord Fullerton:

" I think that the pursuer is entitled to demand from the " defender a year's rent, as for the entry of a singular successor. " The clause of reservation prevents the defender from founding " on the rule, that all destinees of investiture must be admitted " to entry as heirs—a rule which in itself I fully recognise, but " which is excluded from governing this case, which depends on " the general question, whether a superior in landed property is " bound, on offer of one year's rent, to grant new infeftment to a " disponee or singular successor of the vassal, with a destination " of heirs of investiture including not only all the heirs of law of " the disponee, but including as many strangers as the disponee " chooses to have made heirs of investiture in the fee, by the act " of the superior. Now that question, I think (though not " without difficulty), must be answered in the negative.

" The general rule of feudal law in Scotland was, that a supe- " rior could not be forced to admit into a feu any persons but the " heirs of the vassal to whom he had given infeftment. By the " statute 1469, c. 36, an appriser got right to demand from the " superior infeftment in the feu on payment of one year's rent. " And so purchasers of the estate were enabled to force an entry " by becoming apprisers. Nothing is said in the statute regard-

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" ing the heirs of the appriser; but by fair interpretation it was " evident, that the appriser or purchaser must obtain infeftment " to himself and heirs, not in liferent only, but in heritage. But " there exists not in the statute the least shadow of foundation " for holding that the appriser or purchaser, on payment of one " year's rent, had right to demand from the superior infeftment " in favour, not only of himself and all his heirs, but of other " persons who were not his heirs at all, but wholly strangers to his " blood. By other statutes, adjudgers in implement, and other " adjudgers and purchasers at judicial sales, were in like manner " entitled to obtain from the superior infeftment, on payment of " one year's rent. And lastly, by 20th Geo. II., the superior was " bound to give infeftment in the feu to any disponee or singular " successor having a procuratory of resignation in his favour. " These statutes, in like manner as 1469, c. 36, say nothing of " the heirs of the adjudger or singular successor; but on evident " grounds of rational interpretation, these parties had right under " the statutes to infeftment in favour of themselves and their " heirs. And in reference to these statutes it is just equally clear, " that they afford no grounds whatever for holding that the " adjudger or disponee had any right to demand from the " superior infeftment in favour, not only of himself and of his " heirs, but farther in favour of other persons, who were not his " heirs at all, but mere strangers. A superior might, if he chose " add such strangers to the destination of heirs granted to his " new vassal, and if he did so, he made them heirs of investiture. " But there exists not in the statutes any ground whatever for " saying, that the superior was bound, for payment of one year's " rent, to admit strangers in this way.

" And the superior, besides the right, had a strong interest " to object. For anciently the feu reverted to the superior " himself on failure of the vassal and his heirs. And after the " Crown's right as *ultimus hæres* prevailed, still the Crown's " donatory paid one year's rent to the subject-superior for an

" entry. *Vide Erskine*, B. iii. tit. 10, §. 1 and 2; *Jur. Styles*, " vol. i. p. 346. This interest was indeed comparatively weak, " until fetters against alienation, &c., were added to destinations " of succession; because, if the vassal obtained a destination " reaching to mere strangers nowise connected with his heirs by " blood, without any fetters, it was highly probable that, by " alienation or alteration of the succession, the tailzie would be " put an end to before they succeeded; and therefore, when there " were no fetters, the right of the superior might often not be " rigidly insisted on. But when fetters were added, the interest " of the superior became certain and important.

" There are, however, conditions on which it might reason- " ably be held that a superior ought to grant a destination in " favour of strangers. These are, that the charter shall bear a " provision, that each stranger, who thus, being in truth no heir " but a singular successor, should obtain infeftment for himself " and his heirs as destinees of investiture should, for that infeft- " ment, pay one year's rent; or, what in truth is equivalent, " in the view that the superior's claim is good in law, a provi- " sion, that the superior's claim for a year's rent, as a composition " for giving infeftment to each stranger, should be reserved. " Under these conditions, accordingly, I believe it has been usual " in practice to grant infeftment to singular successors, with des- " tinations including strangers, as well as their own heirs. But " without such clauses, I do not believe the practice has pre- " vailed; and still less has the right of the singular successor " been recognized, either in conveyancing or in judicial opinion. " On the contrary, all the authorities our decisions afford lie the " other way.

" In the case of Lockhart against Denholm, decided 10th " July, 1760, both Sir Archibald and Sir Robert Denholm, in " the early part of the last century, took charters from the su- " perior, with a clause, ' that every heir of entail shall be obliged " ' to pay a year's rent for his entry, unless he be at the same

" ' time heir-of-line to the person last vest and seised;' and Sir " Archibald, accordingly paid 200*l.* to Mr. Lockhart as a com- " position for a year's rent,—pretty good evidence of the under- " standing of conveyancers on the subject. True it is, that, " notwithstanding this provision, the Court, on some reason that " is not explained, found that ' the pursuer (*i. e.* Lockhart) had " ' acknowledged the entail, by granting charter and infeftment " ' thereupon to the late Sir Robert Denholm, he was obliged " ' to enter the defender (a substitute, not heir-of-line) as heir " ' of entail, and not as singular successor.' This decision has " since been declared by the Court, and universally understood, " not to be good authority on the point decided. But it is " material to observe here, that it does not rest at all on any " right the entailer originally had, to have obtained on payment " of one year's rent, new infeftment to himself and heirs of " investiture, not being his heirs of law, though that was argued; " but solely on this, that being actually admitted into the " investiture by the superior, they must have entry as heirs, not " as singular successors, the clause of reservation being, on some " ground not explained, held not to be effectual.

" The next case, Mackenzie *against* Mackenzie, 8th July, " 1777, *Mor.* 15,053, is thus abridged in the *Dictionary*:—' The " ' Lords found, that a superior of entailed lands was obliged to " ' enter the heir of entail, who in this case was likewise the heir " ' of the former investiture, and lineal successor in the lands, " ' on receiving a *duplicando* of the feu-duty, and was not " ' entitled to demand from him a year's rent, or other compo- " ' sition; reserving to the superior, and his successors in the " ' superiority, any right which they may have to a year's rent, " ' or other composition on the entry of any future heir of tailzie, " ' not an heir of investiture prior to the tailzie.' It is plain " from this, that the Court were not satisfied that the superior, " though bound to admit Mackenzie and his heirs, was bound to " admit strangers as heirs of investiture, without payment of a

" year's rent for that admission. From the fuller report of the " case in the Appendix, it rather appears that the entailer had " been himself vassal before the entail, and so was not under the " necessity of paying one year's rent for new infeftment to " himself and his heirs of law, and of the former investiture. " But if it was so, that makes little difference, since there is no " doubt in practice, nor was it denied, that a vassal resigning " may, without payment of any casualty, demand new infeft- " ment to himself and his own proper heirs of law and of the " former investiture. The demand of the superior, therefore, " in Mackenzie's case, was rested, and the reservation admitted, " solely in reference to the introduction of a stranger as heir of " investiture. In this case, it is said, 'the Court seemed very " 'much inclined to get complete information concerning the " 'practice; but the practice was discovered to be various.' " That is exactly what was to be expected, on the understanding " that the superior's right in law was good. Still there were " many considerations which would, in many cases, induce the " superior not to insist on that right.

" The next case is that of the Duke of Argyle *against* the " Earl of Dunmore, 19th November, 1795. In that case, 'the " 'defender' (who was the institute, or disponee) 'was willing to " 'pay a year's rent for his entry as singular successor; but the " 'pursuer further insisted, that the charter should contain a " 'declaration, that he should not be obliged to enter such sub- " 'stitutes as were not heirs-male, or of line, to the vassal infeft, " 'without receiving a year's rent from them as singular succes- " 'sors also.' The defender offered to take a charter, with a " clause reserving the superior's claim to a full year's rent, on the " entry of an heir of the tailzied investiture who was not heir of " line to the last infeft; and he contended, that while he made " this admission, 'it was an unnecessary hardship on the defen- " 'der to oblige him to discuss a general point of law, the " 'decision of which cannot affect the interest of himself or of his

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" ' descendants.' And on that ground evidently, the Court, " holding the case of Denholm to be wrong decided, and that " the reservation was effectual, adhered to the finding of the " Lord Ordinary in favour of the Earl of Dunmore. Their in- " terlocutor was—' In respect the reservation proposed by the " ' Earl of Dunmore leaves the question entire, when it shall " ' occur,' (unanimously) ' adhered.'

" Next is the case of the Duke of Hamilton *against* Baillie, " 22nd November, 1827, *Shaw and Dunlop*, vol. vi. p. 94, which " is thus summed up :—' A superior possessing under an entail, " ' having granted a charter of resignation in favour of a vassal, " ' embracing an entail containing a series of heirs; and sasine " ' having been taken, and possession enjoyed for forty years; " ' and an heir of entail having succeeded to the superiority, and " ' refused to receive as his vassal a party claiming entry as an " ' heir of entail under the charter, except in the character of a " ' singular successor, and on payment of a year's rent,—held " ' that he was bound to enter him as an heir.'

" The opinions of the Court are brief and clear :—

" ' LORD PRESIDENT.—In this case the superior, by granting " ' the charter, has agreed to give the heirs of tailzie an entry as " ' heirs; and this has been acted on for forty years. It may be " ' another question, whether a superior is bound to admit of an " ' entail by a vassal.'

" ' LORD GILLIES.—This case will not decide the general " ' question.'

" ' LORD BALGRAY.—There have been forty years' possession, " ' which is sufficient.'

" I have not yet noticed the case of the Magistrates of Aber- " deen *against* Burnett, 17th June, 1808, *Fac. Coll.*, because I do " not consider it at all in point here. It is thus abridged :—' A " ' singular successor of the vassal in a feu, on payment of one " ' year's rent to the superior (a royal burgh) has a right to " ' demand a charter to himself and heirs whatsoever, though

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" ' the charter of his author was to heirs male, burgesses of that " ' burgh, with a clause in the redendo, that they should perform " ' burgh services, and that the fee should not devolve on the " ' feminine sex.' Your Lordships know, that the words ' heir " ' whatsoever' in a charter, have no meaning different from " ' heirs,' or ' heirs at law.' The vassal disponee in that case " made no demand of a tailzied fee at all, or any admission of " destinees beyond his own heirs of law.

" *Lastly*, I may notice, though not as a decision in point, the " case of the Duke of Hamilton *v.* the Earl of Hopetoun, 8th March " 1839. In that case too, the present question was not presented " for decision. The expression, in the opinion of the Court " touching it, is but accidental in giving a general exposition of " law. Still I cannot say it was not their opinion. It was the " opinion of myself, who wrote it, and I cannot doubt was so " also of the other Judges who signed that opinion.

" I may only add, in reference to recent practice, that I have " made some inquiries among conveyancers, and believe the " practice to have continued to this day, of superiors refusing to " grant a destination beyond heirs of law, unless upon condition " of a clause of reservation in favour of the superior's right, to " have effect in case the stranger destinees shall succeed, and as " often as they shall succeed.

" In these circumstances, I am not able to think, that there " is any thing like sufficient authority for rejecting the fair and " reasonable interpretation of the statutes, giving to the singular " successor, for his one year's rent, right to obtain new infeftment " to himself and his heirs of law, but not to other persons wholly " strangers to his blood, as destinees of investiture. And if I be " right in that opinion, then it is not, I think, denied, and at any " rate is clear, that the superior must be successful in the present " case.

" It only remains for me to notice a passage in Stair's *Insti-* " *tutions*, B. ii. tit. 3, § 43, which appears of importance at first

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" sight, but I think very little so on examination. For (1.) Stair " does not speak expressly of infeftment to strangers in addition " to the heirs of the appriser or adjudger. He speaks of a " ' tailzie ;' but that may, and properly does, mean a tailzied (or " cut) destination of heirs of law, not extending at all to strangers. " (2.) Stair ends by saying, ' or at least, if the appriser or ad- " ' judger craves the infeftment to himself and the heirs of tailzie, " ' the superior ought not to refuse it ; for the apprising or adju- " ' dication being assigned to a stranger, he behoved to be infeft; " ' much more the alteration of heirs is allowable.' Stair is " plainly considering only *the alteration* of heirs, not at all the " extension of them, so as to include an indefinite number of " distinct unconnected *stirpes* and their heirs. (3.) Stair does " not say that the tailzie must be admitted on payment of one " year's rent, or on what condition. Indeed, he seems still to " have held the doctrine, that by adjudication in implement, a " superior might be compelled to admit singular successors without " any payment at all, by force of the judgment. He says, (B. ii. " tit. 4, § 6,) ' the cause of this confusion is, that superiors are " ' not obliged to receive the singular successors of their vassals, " ' even though they should offer a year's rent for their entry ; " ' which privilege of superiors, by law and practice, is now " ' evacuated, because superiors may be compelled to receive " ' strangers upon apprising or adjudication for a year's rent ; yea, " ' if the vassal dispone the fee, and oblige himself to infeft upon " ' the obligement, an adjudication is competent against the " ' vassal, so as to oblige the superior to grant the infeftment, " ' which, though frequently practised, yet there is no express " ' law allowing the superior a year's rent : there was indeed a " ' law made for a year's rent, upon adjudication, when apparent " ' heirs did renounce to be heirs, as well as upon apprisings, " ' which doth not bear adjudications for implement of disposi- " ' tions.' Now, if Stair thought that by an adjudication in im- " plement on a disposition, a stranger disponee might force an

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" entry for himself and his heirs without payment of casualty " at all, he might well think that the superior need not make " difficulty about the ulterior heirs of investiture. But in truth " Stair does not appear to have at all contemplated the point now " in question. And accordingly, this passage does not seem to " have been cited in the case of Lockhart, or any of the other " cases in which the point was argued, and certainly could not " possibly have been the regulator of any practice of conveyanc- " ing down to the time when these cases commenced, and still " less since that time.

" J. H. MACKENZIE.

" I concur entirely in this opinion of Lord Mackenzie: Only " I give much more weight than he appears to do, to the recent " decision in the case of the Duke of Hamilton and Lord Hope- " toun, of March, 1839; which, though it does not find, in " express or direct terms, seems to me *necessarily to imply*, that " while a vassal might require his superior to grant an investi- " ture to the whole of his natural heirs, in whatever order he " might choose to arrange them, his right at all events went no " farther; and that it was an indispensable condition in any " series of heirs so sought to be enfranchised, that they should all " hold that character *jure sanguinis;* and not *provisione hominis.* " If the judgment did not proceed upon this assumption, or " rather fundamental principle, I really do not know upon what " it proceeded; and cannot perceive any connection between the " reasoning, so ably deduced in the unanimous opinion of the " consulted Judges, and their conclusion. For myself at least, I " can say, that I conceived this *limitation* of the vassal's right to " be as distinctly fixed by the decision, as its *extension* to the " case more immediately in question; and that I could not now " adopt the views of the defender, without feeling that I was " going directly against the authority of that most deliberate " decision. In strictness of principle, indeed, and especially in

" reference to the genius and history of feudal holdings, what we " now call an heir of provision (if he has no other, or additional " character), I conceive not to be an heir at all, but a disponee or " singular successor merely; and it does not appear to me, that " the mere circumstance of such a person, if once named in any " investiture or substitution, being entitled to make up titles by " service and retour, ought to have any effect whatever on the " independent rights of a superior, who has not bound himself, " directly or indirectly, to renounce these rights.

" F. JEFFREY.

" I concur in the opinions of Lord Mackenzie and Lord " Jeffrey.

" AD. GILLIES.

" I concur in the opinion of Lord Mackenzie, with the addi- " tion made to it by Lord Jeffrey, though I was not present " when the judgment in the case of the Duke of Hamilton against " the Earl of Hopetoun was pronounced by the Second Division " of the Court.

" D. BOYLE.

" I agree in opinion with Lord Jeffrey and Lord Mackenzie, " that in this case the pursuer is entitled to demand from the " defender, the ordinary composition as for a singular successor. " And I may be permitted to add, in explanation, that I think " the conclusion thus come to, stands quite clear of certain other " points, on which the defender seems to consider it to be depen- " dent, and which I should think it quite hopeless to maintain. " Thus, in the *first* place, I think it clear, that when a superior " has once admitted, without qualification or reservation, a cer- " tain line of descent into the investiture of the vassal, that " series of persons, however unconnected by blood, must be dealt " with by the superior as heirs. That is the consequence of the

" consent implied in the superior's own act. Though not heirs " by blood of the original vassal, or of each other, *he* has made " them heirs of the investiture. 2*dly*, I think that the imposi- " tion of fetters, and the consequently diminished probability of " alienation, does not import such an encroachment on the supe- " rior's interest, as to warrant him to demand any higher terms " of entry than if the investiture were free. That point was " fixed in the case of M'Kenzie *v.* M'Kenzie, and evidently " assumed as so fixed, in the subsequent case of the Duke of " Argyle against the Earl of Dunmore; and from the combined " operation of these principles, I think it must follow, that if a " superior has once granted, without qualification, an investiture " to a series of substitutes, strangers in blood to the institute and " to each other, he would not be entitled to refuse a renewal of " that investiture, under the fetters of a strict entail.

" But these propositions do not touch the present question; " because here the superior has never *absolutely* acknowledged the " investiture. He has never, either expressly or by implication, " agreed to hold the stranger substitutes as heirs. On the con- " trary, though granting the investiture in favour of a particular " line of descent, as he was bound to do by the decision in the " case of the Duke of Argyle against Lord Dunmore, he has " done so only under the reservation also sanctioned by that " decision, as well as that of M'Kenzie *v.* M'Kenzie, that his " right should be entire whenever the contingency happened to " which the reservation applied. No doubt, if the case of Lock- " hart against Denham were understood to fix the law, there " would be an end to the question, because there a reservation " much stronger and more express was entirely disregarded. But " the authority of that decision was superseded by the clearest of " all implications in the cases of M'Kenzie and the Duke of " Argyle; as it is impossible to suppose that the Court could " either insert in their interlocutor, as they did in the first case, " or appoint to be inserted in the charter, as they did in the " second, a reservation in itself utterly nugatory.

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" Here, then, the superior having reserved all his rights, in " the event of the succession opening to an heir of investiture, " not the heir by blood of his immediate predecessor, the ques- " tion arises, what those rights are. If a vassal is in every case " entitled, as a matter of absolute right, to demand, and a supe- " rior bound, as a matter of absolute obligation, to grant an entry, " not only to the individual seeking an entry and his heirs, but " to any number of stranger substitutes, then, of course, the " reservation would lead to no consequence. It being clear that " an heir of investiture must in the ordinary case be treated as " an heir, it would follow, that if the superior has no option, but " must admit into the investiture as many stranger substitutes as " the vassal chooses, he can have no legal right to stipulate for a " composition on the entry of any of those substitutes. But, on " the other hand, if the superior lies under no such obligation,— " if, in the general case, he is not absolutely bound to admit " stranger substitutes into the investiture, or to do more than " grant the entry to the individual craving it, and his heirs, then " of course he is entitled to reserve, and to reserve with effect, " his right to claim the ordinary composition when the succes- " sion opens to a stranger substitute. And in regard to the " composition, the Act 1685, authorising entails, has just as little " effect *against* the superior, as the imposition of fetters in terms " of that statute could have in creating a claim for a composition " to which he was otherwise not entitled. If, in the case of an " unfettered investiture, the superior was entitled to stipulate that " each stranger substitute to whom the succession opened, should " be dealt with by him as a singular successor, that legal right is " sufficiently protected by the general reservation in the statute, " of all rights of superiority.

" The question, then, truly comes to be simply this, whether " a superior is absolutely bound, to renew an investiture in the " case of a vassal in possession, or to grant a charter to a singular " successor, on payment of a year's rent, not merely in favour of

" the heirs of the party applying, but in favour of any given " number of substitutions which the party so applying chooses to " insert, or whether the superior, though admitting these substi- " tutions into the investiture at the requisition of the vassal, and " thus enabling them, in form, to take as heirs, is not fairly " entitled to stipulate that *quoad* him, they shall be dealt with, as " they substantially are, as stranger disponees.

" But it does not appear to me that there is authority for the " affirmative of the first proposition. It is undeniable that the " obligations of superiors in this matter, are the creatures of " statute. The whole of the statutes from the act 1649, c. 36, " regarding the entry of apprisers, to the 20th Geo. II., relating " to singular successors, are limited to the entry of the appriser, " or adjudger, or purchaser. They were passed for the sole " purpose of compelling the superior to admit a stranger vassal, " which, at common law, he was not bound to do. No doubt, as " the subject of the right was heritable, the entry of such appriser, " adjudger, or purchaser, necessarily implied the descent of that " right to his heirs, so that the obligations of the superior to " enter the first acquirer, necessarily included the obligation to " enter the heirs of such acquirer as the heirs of the new investi- " ture. In strictness this was applicable only to the heirs at law " of the vassal, but in practice the particular class, of the general " body of heirs to whom the original right was to devolve, seems " to have been left to the option of the vassal—and accordingly in " the case of the Duke of Hamilton against the Earl of Hope- " toun, it is laid down in the opinion of the majority of the " Court, that the vassal in getting the entry, 'may name heirs of " ' law simply, or heirs male, whom failing, heirs female, or any " ' other arrangement of the body of his heirs at law.' But that " is stated under the qualification immediately preceding, 'he " ' shall not go beyond his heirs at law to strangers.'

" I cannot doubt that this was the deliberate opinion of the " Judges who expressed it—and the distinction seems to be well

" founded. Strictly speaking, indeed, the only right of succession " necessarily implied in the right of the original vassal is that of " his heirs at law. But every person who takes as heir, whether " heir of line, heir male, or heir female—every person in short, " who takes under a character, admitting of being established " by general service, may be said to take in right of the ori- " ginal vassal. The character, at least, in which he takes, " is the act of law, not of the original vassal. On the other " hand, a substitute who is called in none of these characters, " is truly nothing but a disponee. Not only his right, but the " character in which he takes the right, is the pure act of the " disponer.

" It is true the superior may have in general very little " interest to object to such an extension of the destination, par- " ticularly when it is unfettered; because, in such circumstances, " the probability of alienation, with its attendant benefit of a " composition, is rather increased than diminished by it. But " in many cases easily supposable, a superior may have a very " clear interest. For instance, in the case of a purchaser who " has no family, and beyond the age admitting the probability " that he ever shall have any—or an entered vassal in the same " situation, could the one demand an entry, or the other resign " for new infeftment in favour of himself and the heirs of his " body, whom failing, an entire stranger. Could a superior be " bound to grant such an entry without a reservation of his " rights; and would not that reservation entitle him to demand " the composition on the estate devolving on the substitute, " nominally called as heir, but *quoad* the superior, and in every " fair view of the case, nothing but the disponee of the vassal? " I think these questions would be answered in favour of the " superior, and the contrary pretensions on the part of the vassal " in such circumstances would neither be supported by the " statutes, nor, as I understand, by any usage which has followed " on them. Indeed, the principle necessarily involved in the

" argument for the defender, carries the matter still farther. In " these cases it is supposed that the entry may have been " demanded, in form at least, in favour of the heirs of the vassal " himself, whom failing, the substitute; but that argument " would be equally good, although the heirs were left out, and " the entry demanded in favour of the vassal, and failing him by " death, whether leaving heirs or not, to a stranger. For the " argument of the defender necessarily involves the proposition, " not only that the heir of investiture shall take without paying " composition, but that any individual or number of individuals, " can be rendered heirs of investiture, entitled to that benefit, by " the mere act of the vassal himself, or, which comes to the same " thing, by an act of the vassal which the superior is compelled " to give effect to.

" Now, it does appear to me that this view cannot be sup- " ported,—and that on the contrary, the rights of these parties " are fairly extricated according to the other principle, namely, " that although the vassal claiming the entry may have an inte- " rest, and has the right particularly under the statute 1685 to " create any number of substitutions, and thus to render the parties " so called, in form, the heirs of investiture *quoad* the form of " succession, still the superior has as clearly an interest and a " right to stipulate, that in relation to him, the substitutes shall " be treated in their character of disponees, taking by the pure " act of the vassal himself, directly operating at each successive " opening of a new substitution. For it appears to me, that in " regard to the superior, each successive substitution can be " considered in no other light than a dispositive act of the " original vassal, postponed and contingent indeed, but still his " dispositive act, operating as a conveyance to a stranger, on each " occasion when the contingency is realized.

" While I conceive this to be the sound construction in " principle of the conflicting rights of superior and vassal in this " matter, I am not aware that it is contradicted by any practice

" or authority. The decided cases, with the exception of that of " Lockhart, which must be considered as superseded, leave the " question entirely open. In fact the reservations authorised in " the cases of M'Kenzie and the Duke of Argyle, were intended " for no other purpose than that of saving it. The act 1685 is " equally inconclusive. The sole purpose of that statute was to " enable parties to secure the descent of their lands to any extent " of substitution, by clauses preventing alienation, adjudication, " or alteration of the order of succession. It expressly reserved " the rights of superiors; and the most conclusive inference " against the supposition of any contemplated interference with " the rights of superiors, is afforded by the consideration, that at " the time of its being passed, superiors were under no direct " obligation to alter existing investitures at all—it could only be " done by the circuitous form of adjudication; in all which par- " ticulars the rights of superiors were left untouched until the act " 20, Geo. II.

" With regard to the passage in *Stair* (B. ii. tit. 3, § 43), it " is so obscurely expressed, that I do not think that it affords " any very conclusive authority; or even any clear indication of " the author's own opinion upon the point now under discussion. " And indeed, if it has any bearing upon the point at all, I think " it affords an authority in favour of the pursuer. At the time " when it was written, the superior could not be called upon to " alter the existing investiture without his consent. The object " was to be obtained only indirectly by means of an apprisement " or adjudication. After stating this, the passage proceeds:— " ' So neither in that case is he obliged to constitute a tailzie, " ' but only to receive the appriser or the adjudger and their " ' heirs whatsomever; unless the debt and decree whereupon " ' the same proceeded be conceived in favour of heirs of tailzie, " ' in which case the apprising or adjudication and infeftment " ' thereupon must be conform, unless it be otherwise by the " ' consent of parties.' Here it certainly appears to be implied,

" that if the debt and decreet be conceived in favour of heirs of " tailzie, the infeftments must be conform, *i. e.* granted to the " same series of heirs. But this opinion is qualified by what " follows—' *at least* if the appriser or adjudger *crave the infeftment* " ' *to himself and the heirs of tailzie, the superior ought not to refuse* " ' *it;* for the apprising or adjudication *being assigned to a* " ' *stranger*, he *behoved to be infeft*, much more, *the alteration of* " ' *heirs is allowable.*' It rather appears to me that in this pas- " sage, the author was considering the question, whether the " superior could be compelled on any terms to receive heirs of " tailzie, through the means of adjudication—whether, in short, " the superior could effectually stand out against admitting, on " any terms, any heirs excepting the heirs of the adjudger. This " question, put in the last form, he decides in the negative, but " without taking into view the other question which arises here, " viz. the particular terms on which the demand could be en- " forced against the superior. The opinion, such as it is, is given " with great hesitation, ' *at least* if the appriser or adjudger crave " ' the infeftment to himself and the heirs of tailzie, *the superior* " ' *ought not to refuse it!*' But it is important to look at the " reason given for this opinion, ' for the apprising or adjudication " ' *being assigned to a stranger* he *behoved to be infeft, much more* " ' *the alteration of heirs is allowable.*' Here the opinion, that " the superior ' ought not to refuse' the admission of heirs of " tailzie, is rested on the ground, that if the apprising or adjudi- " cation were assigned, it ' behoved' the superior to admit the " assignee. And the reason is perhaps satisfactory, in so far as " regards the matter of the admission of heirs of tailzie; but, on " the other hand, it seems to me to imply, that the superior, " though obliged to admit the assignees of adjudgers, and by " analogy, the heir of tailzie, was only obliged to admit the latter, " on the terms which he was entitled to from the former, viz. the " ordinary composition. The passage, though certainly not very " clearly expressed, seems to mean no more than this, that as the

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" superior was obliged to admit assignees of the adjudication, so " he could have no reasonable ground for refusing to admit heirs " of tailzie, *i. e.* heirs different from the heir whatsoever; an " inference or analogy which could only be true, on the supposi- " tion, that in regard to the interests of the superior, the heirs of " tailzie and assignees were to be dealt with on the same terms. " If this be the true construction of the passage, it is evidently an " authority not in favour of, but against the argument of the " defenders. When so constructed, it coincides exactly with the " view, which appears to me the correct one, viz. that although " the superior is obliged to admit substitutes, as he is obliged to " admit singular successors, he is obliged so to admit them only, " because he is entitled, if he pleases, to affix the same terms to " their admission. According to this view, the superior—to use " the very appropriate expression of Stair—' *ought not to refuse :*' " because in reality he has no legal interest to object. Being " obliged to admit singular successors, on payment of the compo- " sition, he cannot be permitted to refuse any number of substi- " tutions, if each substitute, not an heir by blood of the predecessor, " is to be held *quoad* him as a singular successor, taking by virtue " of the dispositive act of the original vassal.

" As to the passage from Erskine, the opinion there given in " such broad terms, rests entirely on the case of Lockhart there " referred to, which since the late decisions in the cases of " M'Kenzie and the Duke of Argyle, can no longer be considered " as an authority.

" JOHN FULLARTON.

These opinions were laid before the judges of the second division at a time when Lord Meadowbank, one of their number, was confined to his house by severe indisposition. It being deemed expedient, however, that his Lordship's opinion on the cause should be obtained, the second division of the Court, of this date, pronounced the following order :—" The Lords, in respect

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" that Lord Meadowbank was present when the Interlocutor " was pronounced remitting the cause for the opinions of the " Lords of the first division, and of the permanent Lords " Ordinary,—had then considered the case,—that there has been " since laid before his Lordship the opinions of the consulted " Judges,—and that it is provided, that, in all cases where such " remits have been made, the judgment to be pronounced by the " division to which the cause belongs, shall be according to the " opinions of the majority of the whole Judges; and his " Lordship being now absent from sèvere indisposition; hereby " require of him, if it be not incompatible with the state of his " health, to communicate to this division the opinion, if any, " which he may have now formed on the whole cause, in order " that the same may be taken into consideration on Friday next, " with the opinions of the consulted Judges, when the case " stands on the roll for advising."

In obedience to this appointment, Lord Meadowbank returned the following opinion :—

" When this case originally came from the Lord Ordinary, " the opinion which I had formed concurred generally in the " views of that stated by Lord Mackenzie; but, having since " reconsidered the case, I have altered that opinion, and now " concur in the result of that of Lords Cockburn, Cuninghame, " Murray, and Ivory. And, having had an opportunity of very " deliberately considering the notes of the opinion which has " been formed by the Lord Justice-Clerk, I find the grounds of " my own therein so clearly and luminously stated, that I am " desirous that upon them mine should be understood mainly " to rest. My absence, therefore, from the deliberations of the " Court, can be of no importance to the parties; because it " would have been impossible for me to have added any thing " in further elucidation of his Lordship's judgment.

" A. MACONOCHIE."

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Upon these opinions coming to be advised by the Court, the Judges delivered the following opinions:—

"LORD JUSTICE-CLERK.—The great difference of opinion in "the Court on this question of feudal law, and the importance "of that question, involving great pecuniary consequences to such "an extensive class of persons, rendering it perhaps a matter of "as wide application as any question which was ever stirred, "will account for the anxiety with which I approach the point "awaiting judgment, although it is one in which my opinions "have been long matured. It is very necessary to consider the "question on strict feudal principles, else we might do great in-"justice to a class of rights just as much legal property of the "highest kind, as the rights of vassals. But in examining what "the feudal principles are which should govern judgment, I can-"not concur in a remark in one of the opinions before us, that "the relation of superior and vassal has received no modification "whatever, except from the direct and immediate operation of "special statute.

"The defender has raised an objection to the summons as not "the proper action to try the question. In the case of Lord "Hopetoun, the objection was stated *in reply* to an argument "that the general precept granted by the Duke of Hamilton had "been unwarrantably and incompetently used by one not entitled "to the benefit of it; and in that case the consulted Judges held "the reply to be good, viz., that in an action of non-entry, "calling the party who is the heir under the existing investiture, "completed by a precept granted by the superior, and the infeft-"ment following on it, the superior cannot say that the infeft-"ment was inept, to the heir under which he calls on to enter. "He ought to disregard the infeftment, or reduce it if he held "it to be bad. But as it is not disputed by the superior in this "case that the investiture containing the destination in question "was correctly made up, the declarator of non-entry is a com-

" petent, and, I think, the proper action, to try the question, on " what terms the entry is to be given.

" I may also say, that I cannot enter into the argument, " founded on a misapprehension of the ground of decision in the " case of Lockhart *v.* Denham, viz., that the reservation is not " sufficient to preserve the claim of the superior, if he could have " originally refused to sanction the destination, which the vassal's " procuratory contained. There is a somewhat metaphysical " argument stated, to the effect that the reservation necessarily " merges, and is absorbed in the sanction of the investiture, so " that the defender can plead the very charter containing the " new grant against the superior's reservation, which qualifies it " as to this matter. But I am of opinion, that the reservation " keeps the question completely open, if the claim is well " founded, and that this argument rests on a misapprehension of " the ground of judgment in Lockhart. Whether such a claim " is consistent with the character of heir which the investiture " bestows on the parties called by the substitution of heirs of " provision, is another question. But I do concur with the " defender in the complaint, that there is considerable vagueness " and obscurity as to the precise plea which the pursuer means " to maintain. His plea on the Record seems to be intentionally " as general and obscure as it could be stated. It is, ' that, in " ' the circumstances condescended on, the pursuers, as superiors, " ' are not bound to give an entry to the defender as their vassal, " ' except on the condition of his making payment of the usual " ' composition of a year's rent of the lands; and as he has " ' refused to pay that composition, they are entitled to decree " ' against him in terms of the conclusions of the summons.' Now, " one of the ' circumstances' prominently stated in the Conde- " scendence is, that the vassal's deed contained the prohibitions " and fencing clauses of a *strict entail*, prohibiting sale or altera- " tion of the order of succession. But still I must take this plea

" to be that contained in the reservation of the charter, which " granted warrant for infeftment on that deed:—' Saving always " ' our own right, and the right of every other person as accords, " ' and declaring that, by granting these presents, we shall not " ' exclude ourselves, or our heirs and successors, from any claim " ' which we or they may have at law to a full year's rent of the " ' lands herein contained, *whenever* the *heirs of entail* to whom " ' the succession shall open shall happen *not* to be *the heir of* " ' *line* of the *person who was last entered and infeft* by us or our " ' foresaids.'

" This plea is not rested on the ground that the destination is " protected by the clauses of a strict entail. To enforce that " plea, I understand the argument to be directed; and although " there is manifestly an attempt in various passages to derive " benefit somehow from the fact that this deed contains an " entail, yet the claim truly is founded on the destination not " being to the heirs of line of the last vassal entered by the " superior. There is no other plea avowedly stated in the case. " (See p. 29, and p. 31). The same is truly the ground taken in " the opinions of Lords Mackenzie, Jeffrey, and Fullerton, which " necessarily extend the claim against every heir of provision " not being an heir at law, without any reference to the fact that " he is called in an entail. I hold it to be quite essential to settle " clearly in the mind, that the question at issue in no respect " whatever depends upon, or ought to be affected by, the fact, " that the destination is protected by the clauses of a strict " entail. In all the cases, except those of Lord Hopetoun's and " Lockhart's, it is manifest that the views stated by the Court, " or a portion of them, were much more affected by mixing up " these two matters, wholly distinct, than they were themselves " aware. A great portion of the pursuer's reasoning is founded " on the alleged encroachment on, or an injury to, the superior's " rights, caused by the prohibitions of an entail, and by the loss, " as it is said, of the benefit to the superior of alienation, of that

" very act which originally was considered a fault against the " superior of the vassal.

" I humbly conceive, that the prohibitions against alienation " or alteration cannot in any logical or legal manner affect the " question, and that the question is precisely the same as if it " had occurred *under an ordinary simple destination*, or when " such was first presented to the superior, a view of the case " which, often as it occurs, has never yet been mooted by any " superior. True, the motive of the superior may be stronger to " try the question in the one case than the other, because the " fee simple destination, if not in favour of heirs of line, will " infalliby be altered whenever the vassal has only heirs female, " and not heirs male of his body. But, in principle, the question " is, in my opinion, the same in both cases.

" A great point, however, is made when this is distinctly " brought out and kept in view, not merely in avoiding the risk " of undue impression on the mind from matter not relevant to " the inquiry, but still more from the legal view opened up as " to the rights of superior and vassal, when the proper effect " of the Act 1685 is considered. To the effect of that statute " on the present question, I must particularly invite the atten- " tion of your Lordships, for I own I have ever thought that its " operation has not received in this question the consideration " due to it. The pursuer's plea is, that, by the common law of " Scotland, he can claim a composition from every party who " is not the heir-of-line—of line, be it observed, under his clause, " of the person last entered as vassal by the superior under the " existing investiture. That, he says, is and always was the law, " —the law as to every heir of provision, not being the heir of " line—long before entails were introduced, and continued and " preserved under the system of entails;—the law, therefore, " equally as to a common destination or tailzied destination. " Then, observe, the statute expressly gives the lieges *power to* " *substitute heirs in their lands by tailzies*, and to enforce and

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" perfect them. What is the meaning of the power so granted? " It is to substitute heirs, granted without any limitation; and " all those substitutes are called by the statute heirs, and " must be held to be heirs, as your Lordships were all satisfied " in the case of Anstruther *v.* A. The substitution of other " heirs than the heirs of line could not be overlooked. That " it would be absurd to suppose. Entails originated in the " preference of other heirs over heirs of line. The term tail- " zie is derived from the usual and common effect of all such " entails, though doubtless, the direct succession might also " be often fenced. Hence, the statute was necessarily framed " with reference to the *selection* of parties by the lieges *to* " *be their heirs.* It has been said by high authority, in the " case of the Duke of Hamilton *v.* Baillie, that the statute is " throughout very ill framed. I venture to differ from that " remark. I think the statute is most skilfully drawn for all " the objects in view, if attention is paid to its terms rather than " to pre-conceived theories, which are attempted to be supported " by it. But, at all events, so plain a matter as the frequent " substitution of others than the heirs of line could not be over- " looked in framing it.

" Let us follow the power given to its consequences. Either " superiors had, before that statute, the right to refuse to enter " any heirs other than heirs of line—to reject heirs male for " instance—or they had not. If such was the right of superiors " before that statute, did it remain after that statute? The " power given to substitute heirs is unqualified, co-extensive " with the right to lands. Opposition by the superior is neither " alluded to nor reserved. Accordingly, on this part of the " statute, the superior founds no argument. Any plea he makes " on the statute is founded on the special clause of reservation " of certain rights at the end of the statute. What that reser- " vation imports, we shall afterwards consider; but, at all events, " the very plea founded on the reservation admits that the power

" to substitute heirs is given even against superiors, (if they " had any right inconsistent with it,) though it is said that their " interests are protected by the clause of reservation. But is " not the statute very important evidence as to the common law " respecting the substitution of heirs? I believe the preservation " of the rights of superiors in 1685, was just as great an object " as any desire to legalize entails. Rights of superiority were " regarded as the most valuable species of property. Feu- " duties were thought the best income, as they could not fall in " value. The various dues paid were sums of ready money " when money was scarce, reckoned of great value; and, accord- " ingly, we know, that the great lawyers of that and the former " generation were very fond of the acquisition of superiorities. " Great political influence arose from the possession of such, and " any encroachment on the rights of superiors, I believe, never " was contemplated or intended by the Legislature. This remark " requires, no doubt, full effect to be given to the clause of " reservation, so far as its terms can go. I regard the statute " as important evidence of the common law of Scotland as " then understood. If, however, the superior had the right con- " tended for before that Act, then it made, *ex concessu*, a most " sweeping change, whatever is the practical benefit of the reser- " vation.

" What is the fair meaning of the leading provision of the " statute? That it shall be lawful to the lieges to 'tailzie their " 'lands, and to substitute heirs in their tailzies.' It is admitted, " as the condition of the argument, as I before stated, that the " superior cannot object to the prohibitions and fencing clauses " of an entail, and that the statute does not protect him as to " that matter. Is that a loss to him? It is said to be so. That " is stated in the close of the able note of the Lord Ordinary in " Duke of Hamilton *v.* Baillie, and it is thought that it was " only an oversight that the superior's right was not protected " from the loss of benefit by alienations. I incline to differ,

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" 1*st*, because I do not believe that the high aristocratic Parliament which passed the Act 1685, would have touched on so plain a point as the rights of superiors, which they all held as important parts of their own rights; and 2*nd*, because I am satisfied that, on feudal principles, the superior never could have objected to his own grant to the vassal and the heirs called (who they could be is another question) being protected from alteration and alienation. On the contrary, I hold the prohibitions and fencing clauses of an entail to be exactly in conformity with the strictest principles as to the relation of superior and vassal, precisely because it secured the continuance of the grant to the vassal and the heirs called. The decision in the case of Hill, and the old case as to corporations, does not rest on the ground that the superior must receive compensation for losing the chance of alienation; but (see opinions in Hill) because a corporation cannot be a vassal in the proper sense of the term—there being no succession of heirs—and hence the ordinary course of feudal tenure and the leading casualty of relief could not obtain. I regard then, the right to tailzie lands as unqualified and absolute, so far as the superior is concerned, and that there either had not existed or was not left, the right to object to the perpetuation of the estate in the heirs called. But if that was the law on this point, either under common law or under this statute, observe the great importance of this fact, (viz. that the fetters of the entail cannot be objected to,) on the next part of the clause, viz., declaring that the lieges in making tailzies of their lands may substitute heirs in their tailzies. If the perpetuation of any one line of succession—if prohibitions against sale and alteration—cannot be objected to by superiors, then how very different the interest to object to the selection of one set of heirs rather than another. Whatever the order is, it may be completely fenced, and all benefit from change wholly excluded, so long as these heirs do not fail; and the case of the Duke of Hamilton and Lord Hopetoun has set-

" tled that the vassal may call his legal heirs in any order and " way he chooses, protecting their succession by the clauses of an " entail. But, again, what is there to lead one to suppose that " this second and very important, nay, necessary, part of the " clause, is less general and unqualified than the former; 'may " ' substitute heirs in their tailzies?' This is put as co-exclusive " with the right to tailzie lands. It is declared to be the right of " all the subjects of the country. All these substitutes are made " and declared to be heirs—heirs in every sense of the word—all " equal heirs by force of the nomination in the tailzie, and no " distinction is pointed at as to the separate character of legal " relations or not. I see one opinion declares, that all heirs of " provision, if they have no other and additional character, viz., " that of blood relationship, are disponees or singular successors, " on feudal principles. (His Lordship referred to the opinion of " Lord Jeffrey, supra.) I hold just the reverse. I hold that the " heir of provision is the character to which feudal law looks, " and no other; that any other and additional character which " the party possesses is of no moment, and never looked to, and " is altogether irrelevant; that if the party is the heir of the grant " or investiture, his right and character as such is exactly the same, " whether he is a stranger in blood or the eldest son. Indeed it " is entirely new to me to hear, that, in a question with the supe- " rior, there is any other character looked to than that of the heir " of the investiture, or that one heir of the investiture is, in respect " of the quality of blood relationship, by which he is not called " at all, the proper heir, and all others in that investiture, singu- " lar successors. And under this statute, and after the opinions " in the case of Anstruther as to collation, I cannot understand " how that proposition can be maintained; and accordingly, in " the opinion by Lord Fullerton, he, in the very outset, most " anxiously disclaims that view. But, then, his Lordship's " opinion in two passages, lays down the very same point, " though differently expressed, where it is said that every

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" substitute, who has not in law a character of heir, which " he could have established by service, independent of the " deed, is a disponee. But whatever might be held as to this " point on general speculation, surely any such notion is utterly " banished out of this case in the most complete manner by " the Statute 1685, which enables the vassal to put all substi- " tutes on the same footing as heirs, whatever claim may be " reserved to superiors. Now, when it is said that parties may " substitute heirs in their tailzies, is that, or is it not, a power " to make them heirs—heirs of investiture,—heirs in every sense " of the term? That cannot be disputed, and is not disputed, by " the pursuer; for his plea is, that while that is the undoubted " effect of the Act 1685, the reservation at the close of it reserves " the *claim* of the superior exactly as if they were not made heirs. " But before the object and effect of the reservation can be ade- " quately considered, we must settle what is the legal import and " operation of the provision, that the lieges may substitute heirs " in their tailzies; and, having settled that, must give full effect " to it consistently and steadily—recollecting that the plea on the " clause of reservation admits of necessity the force of this first " provision. I am humbly of opinion, that, by that provision, " the holders of all property obtained, if they had it not before, or " now possess a right, to substitute any heirs they choose in their " tailzies, and that all substitutes are legally heirs of investiture " —heirs in every sense of the term—to the party making the " tailzie. The more the object and meaning of this part of the " statute is considered, the more clearly does this appear to be " the necessary result of this provision. That this is any change " in the law, or that a vassal could previously have been refused " an investiture to any set of persons whom he chose to name as " his heirs, I am far from holding. But whether the law was " so or not, it appears to me to be the undoubted operation of the " Act 1685, that all persons substituted in any tailzie, or destina- " tion of an estate, are heirs, in every sense of the term, to the

" entailer—heirs also to the person last infeft—but without, by " statute, the consequence of representation—whatever benefit or " right may be reserved to superiors by any after clause.

" What, then, is the import of the reservation? It is as " follows: ' It is farther declared, that nothing in this Act shall " ' prejudge his Majesty as to confiscations or other fines, as the " ' punishment of crimes—or his Majesty, or any other lawful " ' superior, of the casualties of superiority which may arise to " ' them out of the tailzied estate; but these fines and casualties " ' shall import no contravention of the irritant clause.' The " words are very peculiar. It seems to me to be very clear, that " the reservation is to secure the payment of all casualties *out of* " *the estate*, if not paid by the individual, and that such shall not " be held debts included in the prohibition and clauses authorized " by the Act, for the purpose of protecting the estate against " debts. To that object I think the clause is confined. It might " have been contended that the casualties of superiors arising out " of the estate, being also debts of the vassal, could no longer be " enforced against the estate, which was protected against all " debts; and hence for that object, to preserve the superior's " rights and the protecting clauses of the tailzie, I think the " reservation was introduced. Of course, taking that view, I " cannot concur in the explanation given of this clause by Lord " Cuninghame. The pursuer's argument on this clause is founded " on three views, 1*st*, That superiors had the right previously, to " refuse to receive as heirs, any whom the vassal chose to name; " and hence, that the right to demand a composition, as from a " singular successor, was to be reserved. 2*d*, That the compo- " sition for the entry of a singular successor is a casualty of supe- " riority. 3*d*, That, by the above clause, a distinction, unde- " fined indeed, but fundamental, was intended to be drawn by " implication between one class of substitutes and another, viz., " those who are also heirs-at-law, and those who are not—a " distinction of which, certainly, there is no other trace or indi-

" cation in the statute, and which is only obtained by guess out " of this reservation. These three views are all essential to the " plea founded on this reservation. The pursuer's argument on " this clause, I must repeat, admits that the statute gave the " subjects right to destine their lands in any way they choose, and " and to name or substitute heirs to themselves. That is ad- " mitted in the plea founded on the reservation; and hence it " follows, that, if the reservation has not the effect contended " for, in drawing such a remarkable and singular distinction be- " tween the substitutes of an entail, the pursuer's claim wholly " fails.

" In the *first* place, I hold it to be quite clear, that the *com-* " *position* demandable on the entry of a singular successor is not " a *casualty of superiority,* and cannot by any use of legal phrase- " ology that is at all correct, be included within the force remain- " ing at that time. The casualties of superiority are enumerated " by the text writers. They existed long before the Act 1469, c. " 36. That act introduced the year's rent as a compensation for the " loss of the existing vassal, and the introduction of a new party " into the fee. But such a composition is not a casualty arising " out of the estate—was never enumerated or accounted among " the casualties of superiority, whatever looseness there may be " in modern language on the subject—and in 1685, before the " Act of Geo. II., could not have been used with reference to the " obligation on superiors to receive singular successors on pay- " ment of a certain fee, for such obligation, generally speaking, " did not then exist. There was no general right on the part of " the singular successors, taking by procuratory to demand entry " on payment of a composition. Hence, if the heir of entail " could not claim entry as heir under the first part of the statute, " he could not obtain an entry *invito domino* at all. But the " reservation of the casualties, if he is heir, cannot apply to him, " for the composition has no reference to him. This is the " meaning of President Dundas's remark as to *existing* casualties

" in Hailes's notes of the case of M'Kenzie. Accordingly, from " the time that superiors first wished to raise the question under " the Act 1685, as to their claim in the event of an heir of entail " not being heir of line, the composition has never been acknow- " ledged to be a casualty in any of the cases. This appears " remarkably from the terms of the charter in the Westaheill " case in 1720. See Session papers reprinted in Lord Hope- " toun (the casualties are first reserved, and then the claim for a " year's rent). Accordingly, in the case of Lockhart, one ground " firmly taken by that great lawyer, Sir Thomas Miller, is, that " the composition on entering a singular successor was not a " casualty of superiority, but a separate right not arising out of " the relation of superior and vassal, but given by statute as a " compensation for an invasion of that right; while the superior's " counsel tried to make out that the composition was the casualty " of relief. The composition is not *debitum fundi;* the superior " can neither enter into possession nor poind for it. It is only " a personal claim. The clause of reservation, on the contrary, " clearly is intended to save to the superior, as debts against " which the estate was not to be protected by the entail, the " proper casualties arising out of the tailzied estate. This is " clearly the view taken of the matter by the annotator on " Stair, and was the foundation of the judgment in the case of " Lockhart.

" At page 35 of the pursuer's case, it is broadly stated that " Stair and all the authorities class composition among the " casualties of superiority. This is a great mistake. I observed, " that, curiously enough, no particular passages are given in the " reference either to Stair, Erskine, or Bankton, but whole titles " are referred to. And, accordingly, on examining these titles, " all that can be said is, that composition is treated of by Stair " and Bankton in the same long title, which also includes and " treats of, but *separately*, the casualties of superiority. In Ers- " kine it is not treated of at all in the title referred to. I was

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" much astonished at the reference to Stair, knowing that title, " the 4th of the 2nd Book, most intimately. The examination " of it leads necessarily to the very opposite result. Like every " other part of that most methodical and systematic writer, the " title must be considered attentively with reference to its plan. " It commences, first, with the superior's own right of superiority, " the proof thereof, and certain limitations thereof; then as to " the relative position of the vassal, the effect of subinfeudation, " and the duties of the vassal under the reddendo. Then it treats " of the change of the vassal, and of the mode in which an entry " may be forced upon the superior, at that time limited more " than Lord Stair wished. And after having shown how a " stranger may get an entry upon payment of the composition of " a year's rent, the title then proceeds to take up the relative " position of superior and vassal, after a vassal has been received, " and in reference exclusively and solely to the entered vassal " and his heirs. This distinct and separate portion of the title " begins at section 18, and Lord Stair then treats of the proper " casualties of superiority due by the entered vassal or his heirs. " Then are all these specially treated of; and first, 'of the most " 'common casualty of superiority,' non-entry, its remedies, and its " consequences; under which, in title 24, he explains the general " declarator of non-entry for neglect, and the special declarator " for contempt, and this is wholly applicable to the heirs of " entered vassals, giving right to the retoured duties or to the " full duties, according to circumstances. Then the relief is " treated of, or, as he says, immediately subjoined to non-entry, " being due to the superior by the vassal for entering him in the " fee as the lawful successor of the vassal. Then, in section 32, " he mentions what it is to be paid under the statutory compo- " sition, and points out *how it differs* from relief in several parti- " culars. Then he resumes the casualties, and goes through " them, and in no place does he ever confound the composition " with the casualties. This might have been expected in so

" accurate and clear a writer, the casualties being the rights " arising by common law out of the relation of superior and vassal, " composition being, as its term imports, a bonus or compensa- " tion to the superior for being obliged to do something directly " against the original rights of superior and vassal, by an in- " fringement of the same introduced by statute. In no one pas- " sage is the composition ever called a casualty or enumerated. " The very same remarks may be made on the corresponding " title, B. II. tit. 4, of Bankton, written on a more methodical " plan than usual, and plainly on the model of Lord Stair's title. " There is one passage in which the composition seems to be " called a casualty in the sixth paragraph; but this is obviously " loosely used, for he has a separate section in that title, beginning " at article 13, with a distinct heading of the casualty of non- " entry, another of relief; under which he certainly treats of " composition, but in such a way as to show that, as it comes in " place of relief, so it differs widely from the same; and he never " terms it directly a casualty, though he specially calls the relief " a casualty. He mentions the remarkable distinction, that the " adjudger cannot be excluded from possession till he pay a com- " position and enter. The title of Erskine, B. II., tit. 5, is " still more distinct. The casualties beginning at the 5th sec- " tion, are all separately treated of in reference to the original and " proper relation of superior and vassal, including recognition; and " he then resumes the enumeration of them as modelled by our " customs in the 29th section, viz. non-entry, relief, disclamation, " purpresture, and liferent escheat. I particularly refer to the " very accurate and distinct sections on non-entry and relief, per- " haps the very best of Mr. Erskine's work. Take the definition " of non-entry in the 29th section, as well as the full explanation " of it into the 46th, inclusive. Take the definition of relief in " the 47th section, and the explanations of it on to the 50th, in- " clusive, and it will be found, that under neither of these is there " a word which brings in, as a casualty, the composition. Nay,

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" with such rigid accuracy and propriety does Mr. Erskine limit " himself to the casualties when treating of these, that even under " the section which mentions that the casualty of non-entry is " excluded if sasine has been once given to a corporation, he does " not allude to any arrangement as the condition of receiving " them. Then he finishes the whole subject of casualties, and " the composition is never mentioned at all. Accordingly, in the " 6th title, Mr. Erskine begins separately to consider of the " right which the vassal acquires by getting the feu, and of the " extent and import of the grant made to him; then of the pro- " tection to his tenants; after which, forgetting rather his object, " he wanders into the relative rights of landlord and vassal, which " are treated of plainly out of place in the remainder of this title. " Then, in the 7th section, he resumes the subject of the rights " which the vassal acquires by getting the feu, and treats of the " transmission of the right; and it is under this separate subject, " and *in a totally different title*, that he treats of the question of " composition, and of the effect of the Act 1685. What the pur- " suer means, then, by the positive reference to the 5th title of " the 7th Book of Erskine I really cannot understand, for that " title is wholly framed upon a plan which utterly excludes com- " position from the very notion of being a casualty—is limited " exclusively to the old casualties—and in that title composition " is not mentioned; while, on the other hand, the manner in " which it is introduced in a subsequent title, draws the distinc- " tion even more distinctly than Lord Stair. I have stated my " views on this point fully; for I have always held, that if the " composition is not a casualty—it was not so held in 1685—then " the claim of the superior, excluded by the first part of the statute, " and not saved by the reservation, is clearly repugnant to the en- " actments of that statute. In the second place, I apprehend that " the clause is not such as would have been introduced if the object " had been that for which the pursuer contends. I think that the " clause would have expressly referred to the case of the heir of

" tailzie not being an heir at law, considering that the former " part of the statute bestowed the character of heir equally on " all substitutes; and I do think we are warranted to hold that " so plain and important a limitation on the power given to sub- " stitute heirs was to be left to implication, and implication also " out of a clause which, in its obvious purpose, has reference to " the effects of the protection of the estate against debts, if the " casualties of superiority had not been specially mentioned. " The object of the clause is on that view clearly satisfied and " exhausted. In the view then, which I take of this question, I " think it is decided by the operation of the Act 1685.

" In this view of the matter I am confirmed by a careful " examination of the case of Lockhart, which, at all events, I " regard as a decision on the point, and a decision of the highest " authority, pronounced, as President Dundas says, (Lord Advo- " cate, and in the highest practice at its date,) with great una- " nimity in the Notes by Hailes of the case of Mackenzie. That " decision was understood at the time to decide the question. " Erskine, the Professor of Scots Law, says so expressly. Mr. " Erskine's authority is not confined to the passage noticed by " Lord Fullerton, (though it certainly is not the less authori- " tative that it rests on a decision of the Court). He gives his " opinion distinctly in the 6th section of 7th title of Book 2, on " the general point as to the effect of the Act 1685, to the same " purport; and then, in a separate passage, he mentions the case " of Lockhart as a clear authority on the point that a substitute " has all the rights of the character of heir.

" The decision, then, was held to be of great and direct " authority at the time. It is said, in one of the opinions, that " this decision has been declared by the Court since not to be " good authority. I know not where it was so declared. The " point was again mooted in Mackenzie. But in that case the " vassal expressly said, as he was not a stranger, ' the superior,' (I " quote the words of his paper) ' was welcome to a claim of reser-

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" ' vation ;' and, on Lord Braxfield's suggestion, that was adopted,
" one Judge only, by Hailes's Notes, not questioning the authority
" of the case of Lockhart, (for, in Covington's first opinion, he
" agrees with it,) but saying that one decision, to be sure, will
" not make law, so as to bar reconsideration of the point. Again,
" in the case of the Duke of Argyle, the vassal *offered expressly* a
" clause of reservation, not being the party struck at by the claim.
" These two cases do not in any degree appear to me to invali-
" date Lockhart *v.* Denham. They only show what harm is
" done by attempts to avoid the decision of a point when once
" raised. But what is the pursuer's claim? It is, that *every*
" heir of tailzie must pay *who is not heir* of line. The case of
" Lord Hopetoun, as I understand, lays down expressly at least
" this, that the superior has no such right, and that an heir male
" must be entered, though there are numerous heirs of line
" excluded altogether, or postponed. Hence the *plea fails* to the
" extent stated, and to the extent of the reservation in the char-
" ter. But if there is any principle at all in the point, the claim
" ought not to be made applicable to the *heir of line* of the *vassal*
" *last entered*, but to *a party not the heir of the investiture prior*
" to the tailzie. This was the way the reservation was put in
" Mackenzie *v.* M. by the express terms of the judgment (Mor.
" Dy. 15053),—a very remarkable fact not sufficiently noticed.
" But this is a wholly different point altogether. Such a reser-
" vation raises the question, whether the superior can be obliged
" to receive a new set of heirs, even of the body, *e. g.* heirs male,
" if heirs of line were heirs by the prior investiture, or goes on
" some notion of the loss of compositions by the prohibitions
" against sales? The reservation, again, in the case of the Duke
" of Argyle, was directed to the succession of a party who was
" not heir of line to the person last entered and infeft. These two
" reservations are accordingly different, and would depend on
" totally different views of the law. No two views can be more
" different. The cases were *arranged* in a way to save the dis-

" cussion of the question. But if the Court is thought to have " taken in each the view of the subject to which the terms of the " several reservations point, then it is plain that the views were " fundamentally different, yet these two cases are always men- " tioned as going on the same ground. I hold that the Court " gave no opinion in either. The pursuer has chosen the latter " form of reservation. Then he must maintain, contrary to my " view of the Statute 1685, that he can deny to certain classes of " substitutes, named by the entail and in the investiture, the " character of heir. That is the true meaning of the ratio of the " Court in the case of Lockhart, for no heir of provision can be a " singular successor. And here I must observe, that great weight " is due to an argument in the able paper for the vassal, (Sir. J. " Denham *v.* Lockhart,) by Sir Thomas Miller to this effect. " This question does not occur in an original grant of feu. If a " superior, when he first separates out his estate by feuing, shall " stipulate that every heir of entail, to be afterwards appointed, " shall enter as a singular successor, that, as a part of the supe- " rior's property reserved by the original contract, first feuing out " the land, might be effectual as much as a clause tripling the feu " duty, or stipulating for two years' rent on the entry of every " singular successor and the like, on the ground of being an " express compact, by which alone the feu was ever separated " from the *dominium directum*. But when a feu is once granted " without any such matter of special contract and condition, not " so restrained by any condition when the feu is created, and a " vassal exercises his power to substitute heirs in his tailzie, is a " substitute in a deed of provision so executed by a vassal, not an " heir, as much as if the grant had been at first to A. without " mention of heirs, and an entry had been claimed by the heir of " line ? I own in that distinction taken by Sir T. Miller, I think " there is great weight.

" Holding that the question in no degree depends on the " claim for entry being by a substitute under a strict entail, in

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" respect of the operation of the fetters, the next point is, what, " then, is really the pursuer's plea? I apprehend it comes to " this, that every heir of provision (no matter under what deed) " who is not heir-of-line, is a singular successor. No doubt, the " question has been raised in cases of entail, because the motive " and interest of the superior is greater in bringing forward the " claim in cases of entail; and some advantage is supposed to be " derived to the superior from the alleged hardship to him of the " entail. But the claim is equally applicable to *every heir of pro-* " *vision*. On that view of the case, it is now admitted that an " heir-male is not a singular successor, according to the unani- " mous decision in Hopetoun. It is said that, in the opinion of " the consulted Judges in that case, the Court held as a ground " of judgment, that the vassal's power of nomination and selec- " tion extended *only* to heirs at law. Two of the Judges who " signed that opinion entirely disclaim any such view, and so, I " understand, does one of your Lordships. Again, if that expres- " sion in the opinion was deliberately considered by all as an " opinion on the limitation of the vassal's power of nomination, I " have three remarks to make, 1*st*, It was entirely *obiter*, for it " was in no degree necessary for the case of Lord Hopetoun, who " was only an heir-male of the body either of the first vassal, or " of the assignee before infeftment; 2*d*, The parties did not under- " stand the opinions to imply of necessity that every substitute " who was not heir-at-law must pay a compensation, for all that " the Duke of Hamilton (after the decision) asked in the Outer- " House, was a clause of reservation, which was also to reserve " all objection to the claim, if ever made against a stranger; and " 3*d*, The passages in the opinion in Lord Hopetoun are, with " deference, very unfortunately expressed, if intended to be a " definition, as it is now said of the law, for it is not stated " whether the limitation of the vassal's power of nomination is " confined to *selection among the heirs of the body*, or among *all* " *heirs-at-law*, however remote. The opinion speaks of his heirs-

" at-law generally, or natural heirs. That would seem to apply " to all relatives by affinity. Well, then, how far does it go? " May a man call his brother before his sons or his daughters, or " a hundredth cousin living, say the chief of a clan, before his " daughters or his sons? or (to take the Seaforth entail,) 'call " 'the descendant of Colin Fitzgerald, my progenitor, who lived " 'in the reign of Alexander the Third,' before his sons and " daughters. The opinion, which is now said to be a definition " *ex proposito* of the law, really leaves the matter as to heirs-at- " law wholly loose; or, if it is intended to mean all his heirs-at- " law, and any order among them he chooses, then it must go to " the length that a twentieth cousin or hundredth may be called " in before a man's own sons and daughters. I own I do not " know what was intended to be in view by that alleged defi- " nition, neither do any of the three Judges, who allude to this " point, explain this, unless it be Lord Fullerton, who seems " to go the length I have now stated. But on what ground can " it be truly held that the superior cannot object (laying aside the " Act 1685) to the entry, say of a fiftieth cousin, in preference to a " son or daughter? Is that party not in substance a complete " stranger, though in name a cousin? The contrary is carrying the " notion of Scotch cousins rather far. I can see no other reason, " except that the superior has no *delectus* at all in those whom " the vassal is to name as his heirs. When feus reverted to the " superior on the failure of heirs, the superior had a clear right to " limit the heirs to be included in the grant, and he had a *delectus* " as to those by whom service was to be rendered, and his lands " held in return for fidelity to the liege lord. But even then it " was not blood relationship which constituted a party heir. It " was then as now, the choice and designation of the party as " heir-of-provision in the deed settled between superior and vas- " sal. The very principle of *delectus* originally imports that. " But a feu of land is now a sale, with certain reserved rights. " When, therefore, a person has granted a feu, and the vassal

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" sells, the purchaser must pay, as a singular successor, for an " entry; but I am of opinion that the entry must be given in " favour of any successors he names as heirs, and who are to take " by succession from him under his deed. So far from concur- " ring in the doctrine that blood relationship is the legal quality " descriptive of heirs, I am of opinion that it is the nomination " and substitution of parties in the deed of the person whose suc- " cession is to be regulated, and who has right to the feu, and that " whoever appears before the superior nominated and substituted " by a proper deed to the succession, is an heir in every sense of " the term. In short, the right of succession under the deed, and " not blood relationship at all, is the only quality that was ever " looked to in the law, at any period.

" Either the vassal has the right to regulate his own succes- " sion, or he has not. If he has not, then every heir-male not " also of line *ought* to pay as a singular successor. The contrary " is found, and found, I understand, to the extent of the most " sweeping preference of collateral to heirs of the body. If the " vassal has not full right to regulate his succession, how happens " it that in no instance whatever of a stranger succeeding under a " *simple destination*, was a claim for a composition ever dreamt of " or preferred? The point never even was mooted except as to " a tailzied destination, and palpably from the influence of some " notion that the fetters of the entail aided the claim. But if the " vassal generally has the power to regulate the succession to the " feu, it seems to me to be only stating the same proposition, in " other words, (for they seem to be convertible,) when I say that " he has right to name those who are to succeed. Observe, all " take as heirs under a deed of succession. Where a party was " named by the superior's consent, the only character which the " law ever looked to at any time, was the nomination in the " investiture, that made him heir equally whether he had the " additional character of blood relationship or not,—that an heir " of provision is a disponee or singular successor merely, I con-

" sider to be a contradiction in terms, or a legal impossibility. " Now, when a vassal came to have the full right of feu, without " reversion to the superior, and the right, generally speaking, to " regulate the succession in that feu, I am of opinion that substi- " tution in his deed gives the character of heir, which the supe- " rior cannot refuse.

" Farther, the reservation in this case is a very singular one, " for it seems to me to be founded on no clear principle whatever. " It is to claim from any party *not heir of line of the person last* " *infeft* under that grant. But all the heirs under a branch of " substitution to A. B., a stranger in blood to the original granter, " are equally strangers in blood to the granter with A. B. himself.

" Then, on what ground is a distinction taken between A. B., " the present Mr. Ewart, and his heirs of line—all being equally " strangers to the granter or to Lord Balgray. It seems to be " thought that each substitute who begins a new branch of the " substitution, is to appear like a purchaser, and to get a new " grant for himself and his heirs. That view is manifestly repug- " nant to the Statute 1685, as to the power to substitute heirs. " But how is he a purchaser? He can enter only by service. " The last vassal got no benefit by his succession, and he has no " character of a singular successor whatever. Nay, he is heir of " the granter in every sense of the term,—fully as much as Lord " Balgray—and incurs representation *ad valorem* to him. But, " farther, the heir of tailzie who is so to pay, has no power to get " an entry including all his heirs. Nay, his heirs of line may be " wholly excluded, and all his collaterals, if the tailzie is limited " to the heirs-male of his body. So he would have to pay without " the benefit of a general grant, and would be worse off than a " common purchaser; and the result will be that the right of " superiors are infinitely improved by entails, for they will get a " composition on every new substitution, and for a far more " limited class of heirs than at common law. This certainly " would be a whimsical issue of the effect of entails on the situ-

"ation of superiors. But it is said it is only his heirs of line "who can be admitted. Then the reservation is clearly against "law, and fails beyond all question according to the case of "Hopetoun.

"It seems to be a point not undeserving of grave considera- "tion, whether, when the reserved claim fails, as it confessedly "does in the opinion of the whole Court, and is bad according to "the *terms and object of the reservation*, the superior is entitled "to maintain that he can form and mould that clause into a "different reservation, applicable to a totally different case. He "has no claim, because the succession has opened to one who is "*not the heir of line* of the vassal last entered. On that ground "he has no claim. Every heir male, if the destination was broad "enough, in whatever order, however capricious, could enter. "Now, if the ground of exclusion is bad in law, it is matter of "grave doubt whether the clause can be carved into a different "and special reservation, not founded on the principles stated in "the clause, but on another and separate point. I am unwilling, "however, at this stage of the case, to press a point not started "by the defender.

"I am more anxious earnestly to request the attention of your "Lordships to the distinction which seems to be taken between "the first party in a new substitution, and the heirs under that "clause of substitution. For instance, turn to record, p. 20, "'whom failing, to Robert Ewart, grandson of Dr. Robert "'Ewart, physician in Jamaica, my brother, and the heirs-male "'lawfully to be procreated of the body of the said Robert "'Ewart, my grandnephew.' Take the substitution to the defen- "der. This might have included those who were not heirs to "Robert Ewart. But even with Robert Ewart and his heirs- "male, what difference is there between the character in which "Robert Ewart presents himself and his heirs-male? I can see "none. There may be no blood relationship to the original "granter. Each takes equally by service. Each takes by force

" of the nomination in the deed. Each takes independent of the " other. Each takes as heir of provision, and as heir of provision " only. Accordingly, in the only opinion which humbly appears " to me to approach this very difficult point in the argument of " the pursuer, this is admitted in one passage, and the person first " named in a new branch of substitution is put precisely on the " same footing with all those called in that substitution. For, " after disclaiming very anxiously the doctrine of Lord Jeffrey as " to blood relationship, Lord Fullerton not only reverts to it, but " follows it out to the extent of putting every substitution called " upon the same footing, whether he is the first of a new branch " or not. Now, upon that principle, it is quite plain each substi- " tute in a *new branch* must be viewed as a disponee or singular " successor, if he has not in him the separate quality of blood " relationship as much as the first member, called nominatim of " that new branch. Lord Fullerton here holds that you must " only look to relationship to the original granter. But the " pursuer's claim is rested upon the different ground, that the " defender is not the heir of Lord Balgray. But, with great defer- " ence, the principle stated, if I understand another passage, " is not adhered to, and it seems to be thought that the claim " opens only when the succession devolves *upon a new branch* of " substitution, giving a right to a composition only from the first " substitute in that new branch,—a view which draws a second " distinction between substitutes, not consistent, as I conceive, " with the Act 1685. If this means that each new substitute is to " pay upon the ground of being a disponee, taking by the act of " the original vassal, then it is quite consistent, and on the same " principle on which Robert Ewart pays, so will each of his heirs- " male. Is that the principle which is to be laid down? In that " case, again, superiors will have got a great benefit by entails, for " every substitute who is not the heir of line of the original vassal " must pay as a disponee, though he succeeds his own father, and " most consistently and necessarily, upon any view I have been

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" able to take of the general argument of the superiors. For " what difference is there between the case of A. B. in a new sub- " stitution in an entail, if he is to be viewed as a disponee, because " he takes by the act of the original vassal, and the case of A. B.'s " sons. They are disponees as much, beyond all doubt, as A. B., " on the principle stated by Lord Fullerton, and if the principle " is to be adopted, it must be carried to that length. I have " ventured to notice this point in the opinions of my brethren, for " I candidly own that, if these opinions had ruled, I could not as " yet have been able to propose any Interlocutor to your Lordships, " not knowing whether only the first substitute of a new branch " of the substitution, or each heir in each branch must pay, if not " heir of line. But how does the general view as to the substi- " tute being a stranger, if he could not take otherwise by service " to the entailer, support the claim of the present pursuer? He " rejects the principle of relationship to the *original* vassal, and " he claims because the defender is not the heir-of-line of *Lord* " *Balgray*. Now, on what ground is that claim founded? Lord " Balgray was not the maker of the entail. His act did not call " Mr. Ewart. He got no benefit, surely, by the destination in " favour of Mr. Ewart; and I cannot see how the reasoning here " applies at all. Farther, Mr. Ewart is asking for no new grant. " He does not ask for the admission of any heirs of his own; he " cannot exclude them; he cannot benefit them. His entry " gives them no right; on the contrary, it only postpones their " succession. Then, if he is to pay because not a relation of Lord " Balgray, on what ground are the heirs-male of his body not " equally to pay? They do not succeed by his act or as his heir; " they succeed because they are so called *descriptive*, to be sure, " but, as Lord Fullerton says, by the act of the maker of the " entail, and any claim competent against Robert Ewart ought " to apply equally to the heirs-male of his body. According to " one view of the opinions they would pay, and I see no intelli- " gible principle on which they could be exempted, for Mr.

" Ewart asks nothing for them, and can give them nothing by his " entry.

" Such are the results and the inconsistent operation of the " principles of the superior. Two remarks only in conclusion; " 1. It appears to me that there is some error in the inferences " drawn from the statutes respecting the entry of adjudgers, and " apprisers, and latterly purchasers. These were cases of com- " pulsory charges of the vassal *invito domino*, often against his " interest as superior, against the bargain and contract subsisting " between superior and vassal, and against the fundamental obli- " gation on the vassal of keeping the feu. Hence, as the superior " could not be called upon to change the investiture once consti- " tuted, a bonus was to be given to him. But I do not think " that these statutes, and the rights which they recognize in " superiors, bear very materially, if at all, on the question as to " the vassal's power (having paid for his entry) to name his own " heirs in the investiture that is to be completed, and by which " he proposes to hold the feu without the power of sale. 2. I am " surprised to find reference made to practice, which, however, is " said only to exist to the extent of requiring reservations when " entails are executed. No one need object to that, for the effect " of such was future and undecided. But the important practice " to look to is this. Is there a single case of any superior demand- " ing a composition when a stranger succeeds under a fee-simple " destination of an estate? Neither has notice been taken of the " important practice of the prime superior of the whole land in " the country, and attention has not been paid to the alarming " claims which could open to the Crown against the subjects. On " the argument of the superior, the Crown would have a claim " for a year's rent in every case in which the heir, asking for an " entry, had no other character than that of heir of provision, " whether in a fee simple, or tailzied destination. It is a great " mistake to suppose that the rights of the Crown were not very " deliberately and thoroughly investigated, after the institution of

" the new Court of Exchequer on the Union. On the contrary, " the opinions in the State Paper Office, and the Advocates' " Library, by the Scotch Crown Counsel, show that every point " was most narrowly and vigilantly looked into. It is stated in " the case of Lockhart v. Denham, and I believe is the fact, that " the Crown first raised the question after the Union, that a supe- " rior was not bound to receive a corporation. Many instances " might be given of the vigilance with which all questions, " respecting the rights of the Crown, were considered after the " Union. Yet in no single instance has a composition ever been " asked from any party named as heir or substitute by the vassal, " that vassal having paid his own composition if a stranger. On " the contrary, one composition, and one composition only, has " hitherto enabled the Crown vassals, in obtaining right to their " lands, to name any heirs of provision or tailzie they chose, and " from no heir of tailzie has a composition ever been demanded, " at least up to the date when I was a law officer of the Crown. " On this point I have a distinct memorandum from the office of " Presenter of Signatures, obtained in 1829, when I was Solicitor- " General. I must say that I attach the greatest importance " to this practice on the part of the Crown. They have never " even attempted, generally speaking, to reserve the claim for " composition, although regularly exacted in every case of a " proper stranger not entering as substitute, but as purchaser. It " would be with great reluctance that I should feel constrained " to open up to the Crown a new claim that would operate so " severely and so extensively on the principles contended for by " the pursuer.

" On the whole, I am of opinion that the claim of the supe- " rior to one year's rent of the lands in question should be " repelled, being the form of the Interlocutor in the case of Lord " Hopetoun, and the cause remitted to the Lord Ordinary to " proceed farther as he shall deem just. Whether a ratio " should be added or not, in this case, may be a matter of

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" question. If so, and I rather think the ground of judgment " should be stated, I would propose that the finding should be, " that ' the defender, being an heir substituted in the deed granted " ' by the vassal, and in the investiture for which a composition " ' was previously paid, is entitled to be entered as an heir, on " ' payment of the casualty of relief.'

" LORD MEDWYN.—This is certainly a very nice and difficult " question. The Court, ever since the case of Denham, 1760, " have waived the determination of it, and the diversity of " opinion among our brethren, now that it comes before us for " decision, shows its difficulty. I have given the case the most " careful consideration, more especially since I have had the " benefit of the opinions of my brethren; and the opinion I have " formed I now submit with all deference to that delivered by " your Lordship.

" I consider this declarator as the proper mode of trying the " question, upon what terms the defender is to obtain an entry " to the lands of Allershaw; neither do I think it of any " importance, in this case, that he is called into process as heir " of entail. The question is, since the defender is unquestionably " not the heir of the person last infeft, but is an heir of provision " merely, is the composition of a year's rent due for an entry, or " is he to be received simply for a duplicand of the feu-duty?

" When the first heir of entail, who was not heir of line of " the maker, obtained an entry and was infeft under the entail, " he paid a year's rent to the superior, and a clause was inserted, " that the superior was not to be excluded from any claim there " might be at law for a full year's rent, when the future heirs " of entail shall happen not to be heirs of line of the ' person last " ' entered and infeft.' The question, then, is open, and now " comes for decision, as the defender is not heir of line but heir " of provision only of Lord Balgray, the heir last entered under " the composition paid; it is of no consequence whether it be

" under a strict entail or a simple destination. It will occur " when the heir of provision comes to enter, although, by the " unfettered nature of the property, he might have been excluded " by the prior heir having changed the destination.

" The question seems to me to depend much on the effect " which the Act 1685 had on the right of superiors previously " existing, which necessarily involves the inquiry as to how these " rights stood at that period. 'By the genuine principles of the " ' feudal system, no vassal had a power to transfer the right of his " ' feu to another without the superior's consent, and the superior " ' was not bound to receive any person in the lands other than " ' the heirs to whom he himself had limited the descent by " ' the investiture, though the greatest sum should have been " ' offered him in the name of entry.' And he quotes the case " of Cleland, 24th February, 1685, for this,—decided the very " same year in which the act concerning tailzies was passed,— " where it was held that it was arbitrary for a superior to receive, " or not receive, a vassal. An important right was originally " connected with this, that, when the heirs of the investiture " failed, the superior succeeded as *ultimus hæres*. There is a " case in *Balfour*, p. 484, c. 5, to this effect in 1506, where the " grant had been to a man and the heirs-male of his body; on " the failure of these it was held that the superior was entitled " to take them even from the heirs-female of his body. See also " *Balfour*, p. 232, c. 38; Craig, B. 2, D. 17, §. 17, mentions " this also as the rights of the superior, but says that some " thought the Crown should succeed. The opinion in favour of " the Sovereign gained ground, so that in *Dirleton*, p. 119, he " resolved the question by a reasonable distinction, that if the " fee be limited, as to heirs-male, on their failure the superior " should have right; but if the grant be to heirs whatsoever the " fee is simple, and the granter, having given every right away, " the superior had reserved nothing, and can pretend no right to " the same.

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" But this distinction was not followed out, and the right of " the Sovereign prevailed, and was enforced. In 1680, Fountain- " hall, Vol. I, p. 97, mentions two cases where the Crown, as " *ultimus hæres*, excluded, in the one case, daughters, and in the " other, a brother; and in Tenant July 1688, ' The " ' Lords found, that, either in an original feu or posterior infeft- " ' ment of tailzie, where the provision is in favour of heirs " ' male, and not the heirs whatsomever, that the heir of line " ' cannot succeed, but that the right does devolve on the King as " ' *ultimus hæres.*' Now, although the superior's right was here " abridged, yet the donator of the Crown necessarily could obtain " an entry on no other terms than any other singular successor. " The donator is liable for the debts of the last possessor coming " in place of the Crown, who, as Dirleton says, cannot succeed " but by way of representation and as *ultimus hæres;* and he " also must be liable in a composition like any other grantee. " It would be different in the case of forfeiture for treason. " A donator, on forfeiture, does not pay a composition for an " entry. Blair, 1680, p. 15,045; Duke of Gordon, 1771, p. " 15,050. The Sovereign did not take as an heir but by escheat, " and therefore was not liable for the rebel's debts till 1690, " c. 33.

" The superior's right to refuse an entry to a stranger came " to be abridged so early as the fifteenth century, for by 1469, " c. 36, superiors were forced to receive creditors apprisers as " vassals on payment of one year's rent of the lands; and " although this was only intended for the case of judicial sales " at the instance of creditors, and for their behoof, yet it came " to be used as a device to compel the entry of a purchaser, by " which, as Craig says, Lib. 3, D. 1, § 13, this right of refusal " ' *hodie pæne subvertitur magno dominorum damno;*' and yet he " never heard such apprisings set aside, *sub prætextu aut collu-* " *sionis aut simulationis.* Superiors, it may be presumed, were " generally satisfied with obtaining a year's rent for the trans-

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" ference, and this came to be fixed as the price for foregoing his " right to refuse an entry, which might thus have been enforced " upon them circuitously, more especially after the example set " by the Sovereign; for the Act 1578, c. 66, mentions, that, by " several acts of the Privy Council, purchasers were secure of " being received as vassals by the Crown upon their reasonable " expenses, *i. e.*, on a composition to be paid to the Treasury, " which practice fixed, at a moderate rate, one-sixth of the valued " rent. The favourable manner in which the Sovereign has " always treated vassals as to their entry, makes the circum- " stance that the Crown makes no such claim as the superior " here does, which your Lordship says is the case, of less weight " than it might otherwise have. A subject superior is entitled " to and exacts a year's rent from a purchaser, although the " Crown only claims a small portion of the valued rent. That, " then, will not affect an ordinary superior's rights.

" By 1669, c. 18, adjudications were put on the same footing " as comprisings with regard to payment of a year's rent, so that " the superiors of lands, annual rents, and others adjudged, shall " not be holden to grant any charter for infefting the adjudger, " till such time as he be paid and satisfied of the year's rent of " the lands and others adjudged; for although the Act 1621 had " treated of adjudications against the heir lying out unentered, " following out the Act 1540, c. 106, when a creditor, either his " own or his ancestor's, wished to pursue for his debt; and " although custom had also introduced adjudications in imple- " ment of disposition and obligements to infeft, yet to these the " payment of a year's rent had not been extended.

" When adjudications were substituted for apprisings by " 1672, c. 19, the payment of a year's rent was still the con- " dition; and finally, purchasers at a judicial sale were, by 1681, " c. 17, entitled to an entry on the same terms.

" Now, these relaxations of the superior's right were all, ex- " cept the last, in favour of creditors, and the last, which was in

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" favour of purchasers, was on account of its bearing on the " interest of creditors. It was to give them payment of their " debts that these statutory regulations were introduced. No " change was made in the case of an ordinary purchaser, still " less of a proprietor wishing to make a tailzie of his lands, " cutting off the right line of heirs. These statutes, accordingly, " speak only of the superior receiving the appriser, or adjudger, " or purchaser at the judicial sale, and never even mention " heirs, far less heirs of provision. This would have been " going beyond the object in view, which was simply to prevent " the privilege of the superior absolutely to refuse a new vassal " standing in the way of a creditor obtaining payment of his " debt. If he wished to acquire the lands themselves, and " destine them to heirs different from his heirs of line, I " see no provision in any of these statutes which could compel " the superior to receive a series of strangers substituted to him. " This, it appears, must have been still the subject of treaty with " the superior.

" I am quite aware that it was common for proprietors of " land to tailzie their estates, sometimes more strictly and some- " times less so, by simple destination, with prohibitions, and " finally, with irritant clauses, but they were not favourites of " the law, and with great difficulty sanctioned. That this was " so, is apparent from our Statute-Book. Thus James III., by " 1476, c. 70, revokes all 'Tailzies maid in his tender age fra " 'the richteous aires;' and Craig, Lib. 2, D. 16, § 12, says, " that taillies confirmed by subject superiors when minors, might " be reduced by them. James IV., in like manner, by 1493, " c. 51, revokes 'all tailzies maid fra the aires general to the " 'aires maill of anie landes in our realm,' plainly implying that " scarcely any other tailzie was then known; and in the revoca- " tion by James VI., by 1587, c. 31, of all tailzies made by him " in his minority upon resignations, from the heirs general to the " heirs male, 'against the law and gude conscience;' an excep-

" tion is made as to conquest 'because it is not against conscience
" 'that onie person quho acquires the richt of onie heritable
" 'landes, may take the same to sik aires as he pleises.' This
" merely imports that a person acquiring lands might make them
" to descend to heirs male, or perhaps stranger heirs, without
" being held to proceed against good conscience, but it by no
" means imports that the superior must receive these extraneous
" heirs, as he must the acquirer and his heirs of line. It is
" true, Craig, Lib. 2, D. 1, § 13, maintains that such entails are
" neither against law nor conscience, and mentions that they
" were supported by the Court in the case of M'Lachlan *v.*
" Lamont, 1st March, 1548, and accordingly this decision is
" reported by Balfour, p. 173, as the first case supporting that
" view of the law, but in the very next year an opposite
" judgment is given, p. 174, c. 3, and from a case also noticed by
" Balfour, decided a few years afterwards, where the term heirs
" of tailzie in general was extended to all such, as well in the
" right line descending, as in side line or collateral—Campbell
" *v.* Grahame, 18th June, 1566, p. 174, I infer that these heirs
" of tailzie were heirs male, and certainly could not be stranger
" heirs. Craig distinctly restricts the term heirs of tailzie to
" heirs male, to the exclusion of heirs female of the maker.
" Accordingly, one of the reasons he gives (L. 2, D. 16, § 20)
" why tailzies were not encouraged by superiors, (and he says,
" 'Tailliari feuda ex jure nostro non possunt, nisi ex consensu
" 'domini sui superioris,' L. 2, D. 3, § 43; and Stair lays down
" the same doctrine, that 'a tailzie must be constituted by the
" superiors) is, that it excludes females 'cum majores multas
" 'commoditates proveneant ex hærede fœmina, quam masculo.'
" This was no doubt the first form of entails; but when more
" distant relations came to be introduced into a substitution,
" Craig denominates them heirs of provision, giving them a new
" designation, *as now first known to the law*, in consequence of
" this enlarged exercise of the power of entailing.

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" But it may be that the form of apprising came at a later " period, and nearer the date of the Act 1685, to be used not " merely to procure an entry to a purchaser and his heirs of his " heirs male, but to strangers in their character of heirs of " provision. But I see no proof of this, and I think there is no " probability of it. When Craig complains, that under the " Act 1469, purchasers, not creditors merely, compelled the " superior to receive them on payment of a year's rent, and that " he had never seen the attempt to resist this successful, I think " it cannot be supposed that this was anything else than the " purchaser assuming the character of a creditor, but with- " out any substitution of extraneous heirs. I do not believe " that such substitutions were very common at that time; I " rather suppose I may say that they were not; and I can " scarcely doubt that, although the courts of law were willing " to abridge the rights of superiors, so as to admit a purchaser's " entry on the same terms as if he were a creditor, they would " have scrupled to allow of a substitution of stranger heirs, and " compel the superior also to receive them by assuming a " character totally alien from his true one, in order to accom- " plish such an object, at a time when the state of the country " and of the law made so very intimate a connection between " superior and vassal, and when it was almost essential that the " superior should have a *delectus personæ* in his vassal.

" The opinion of Stair on this point is noticed on both sides. " One thing is very clear, that in neither of the passages is the " learned author treating of the point at present in dispute—the " composition for an entry. In the first passage referred to, " (B. ii. t. iii. § 43,) he states it as the law, when his first edition " was written prior to 1685, that tailzies must be constituted by " the superior, and that he is not bound to alter the tenor of an " investiture, except where it is provided by law, whereby he is " necessitated to receive apprisers and adjudgers. This of course " would be presumed to include only these creditors themselves

" and their heirs, as all that was necessary for the object in view;
" and so it is, for Stair goes on thus: 'so neither in that case is
" 'he obliged to constitute a tailzie, but only to receive the
" 'appriser or the adjudger and their heirs whatsoever.' This is
" a very distinct expression of opinion; and I cannot help think-
" ing, that when public opinion induced the courts of law to
" sanction the extension of the form of apprising to the case of
" purchasers, it would not go beyond the heirs whatsoever or
" possibly heirs male, and would not compel the superior to
" receive strangers not of his own selection for vassals, and to the
" loss of a composition for an entry. One case mentioned by
" Stair, which immediately follows the words last quoted, forti-
" fies this view; for the superior is only to receive the adjudger
" and his heirs,—'unless the debt and decreet whereon the same
" 'proceeded, be conceived in favour of heirs of tailzie, in which
" 'case the apprising or adjudication, and infeftment thereupon,
" 'must be conform, unless it be otherwise by consent of parties.'
" Certainly an adjudication on a debt must be in conformity with
" the destination in the bond constituting the debt, and unless by
" mutual consent this be altered, the decree must pass in these
" terms. This is merely following out the benefit conferred on a
" creditor, in order to recover payment from the lands of his
" debtor, for the remedy would have been incomplete if adjudica-
" tion could not pass on a taillied bond for borrowed money.
" But it would not be often that securities for money would be
" taken in that form so as to bring in a stranger, instead of
" simply to the creditor, his heirs, and executors; and to admit
" it in such a case is a very different matter indeed from allowing
" a proprietor to make an entail of his estate to a series of
" stranger substitutes, and adjudge either upon a bond or oblige-
" ment to convey so framed. As yet Stair most clearly is treat-
" ing of the case of a real creditor for borrowed money adjudging;
" and I farther think he is treating of the rights of a proper
" creditor, when he goes on to consider the case where the

" apprising or adjudication has been on a bond to heirs, and a " tailzied infeftment is wished; for he says, 'or at least if the " 'appriser or adjudger crave the infeftment to himself and the " 'heirs of tailzie, the superior ought not to refuse it.' He is cer- " tainly not bound to do more than allow the lands to be adjudged " in terms of the bond; but the reason why he should not refuse " to give infeftment in favour of heirs of tailzie, is not that he has " no right to do so, but this—'for the apprising or adjudication " 'being assigned to a stranger, he behoved to be infeft, much " 'more the alteration of heirs is allowable.' It is then only an " alteration of heirs that is in view, as instead of heirs whatso- " ever, destining the lands perhaps to heirs male, not the substi- " tution of strangers, and the reason given shows that, even as to " heirs, it is only one alteration of heirs that is contemplated, not " a destination including as many strangers to himself and to " each other, as the maker of the deed may choose. For if an " adjudication be assigned before infeftment to a stranger, the " stranger must be infeft. But he will pay a composition " just as the adjudger would have done. Nay, there is a " case where an adjudger assigned to an assignee, and he " again, without taking infeftment to another, and the superior " was obliged to receive this second assignee, receiving only a " single composition—(Colmslie, 12th March, 1629, p. 200). But " this only introduces the first stranger into the investiture, it " goes no way to support the notion that any number of stranger " substitutes might be introduced into a taillie, and the superior " compelled to receive them on payment of a single composition, " still less that a proprietor might taillie on himself or his heirs " male, whom failing strangers, and could force the superior by " adjudication to grant him an investiture in these terms, when " of course he must be received upon payment of relief as an heir " only. Nay, I think I may draw this inference from it, that it " could not then be held that an appriser even, far less a pur- " chaser, under the form of an apprising, could compel the supe-

" rior to give an investiture to him, and to a series of strangers " substitutes for a single year's composition, otherwise such a " claim never would have been made, that each assignee before " infeftment must pay composition. This was plainly viewed as " defeating a right to refuse such substitutes without paying a " composition. But the claim was not sustained upon a prin- " ciple quite apart from admitting the right of an appriser to " force the superior to receive any heirs of provision the appriser " chose to offer as vassals.

" It will be observed, that I use the term taillie in its original " meaning, whether protected by irritant clauses or not. If they " be so protected, this gives the superior a stronger interest to " enforce his right, but it arises under the other form also.

" It is fit, too, that I should notice that, after the passing of " the Act 1685, Stair made no change in the above passage of his " work. He does not seem to think that the Act in this respect " at all abridged the right of the superior. How easy and how " natural would it have been for him to have noticed this, if it " really had been his view of the Act. But it must not be for- " gotten, that if a purchaser did wish to destine his lands to a " series of stranger heirs, there was a privilege which the superior " had which would effectually prevent him under the guise of an " adjudger from forcing upon him strangers as his vassals, so that " it must still have been matter of treaty between them. For the " Act as to apprisings authorized the superior to acquire the sub- " ject apprised by making payment of the debt, and the same " privilege was extended to an adjudger in the case of Scot, 10th " June, 1671, where it was farther found that it was redeemable " from the superior by the vassal within the legal, without pay- " ing a year's entry, because the vassal was thus not changed. " (*Stair*, B. 2. T. 4. § 12.) I may notice, in passing, that the " same privilege was not given to the superior in the case of a " judicial sale. (Kennedy, 6th February, 1695.) Fountainhall

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" says, 'the Lords unanimously found the superior's right of " ' redeeming took no place in their sales.'

" As to the other passage referred to from *Stair*, § 59, it " seems to me to advert merely to this, that if a superior does " not accept of resignation voluntarily, he will be obliged to admit " the adjudger in implement; but it says nothing as to stranger " heirs being forced on the superior by this form of proceeding. I " wish finally to remark, that, in neither of the cases last men- " tioned, is there the least appearance that the destination was " other than to the adjudger and his heirs; nor can I discover in " our books a single instance of an adjudger forcing an entry for " stranger heirs. There are abundance of instances in the *Dic-* " *tionary v.* Superior and Vassal, of adjudgers claiming an entry, " and also of superiors suspending such a charge on various " grounds, but not a single instance on the ground that it was to " introduce stranger heirs. All bear that the entry is for the " adjudger simply; which, I must say, satisfies me that no " greater relaxation of the superior's right to refuse a change of " vassals was sanctioned beyond the statutory enactment com- " pelling him to receive an appriser or adjudger. I cannot hold " that it was so extended in practice, that it was vain for even the " most determined stickler for a superior's privileges to urge this " plea. I think the legitimate conclusion from the absence of " decided cases, is, that no adjudger believed the Court would " sustain such a claim, and therefore, that, as in the case of a " voluntary purchaser, he knew he must transact with the supe- " rior, if he wished the subject adjudged to pass to stranger heirs, " and that he could only acquire this privilege by treaty with the " superior.

" Upon the whole, then, I do not see that it has been made " out that a superior was bound, prior to 1685, in granting an " investiture to an adjudger, or to a purchaser in the form of " an adjudger, to go beyond the ordinary style to him and his

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" heirs male or heirs of line, but not to strangers whom he might " wish to substitute; and as the superior could always exclude " him by taking the adjudication to himself, this was an addi- " tional power he had to make him purchase a destination such " as he wished, by paying what could only be matter of treaty " and contract between them.

" The Act 1685 was then passed, and as it is the main ground " of the vassal's plea in this case, it is of great importance to " attend to its object and its enactments for carrying out that " object. I presume it will not be disputed, that its sole object " was to legalise the irritant clauses of an entail so as to make " them effectual against creditors and purchasers, and to do this " in such a way as to protect the interest of future heirs of entail, " at the same time doing as little injury as possible to any other " members of the community. Hence when the Legislature " enacted, that it should be lawful to tailzie estates and to sub- " stitute heirs in their tailzies, with such provisions as they " think fit, and to affect them with irritant and resolutive clauses, " it was necessary to provide some mode of informing the public " of what tailzies were allowed, that creditors and purchasers " might know they were dealing with a person who could not " bind his estate. This was done by production of the entail to " the Court of Session, and its insertion in the Register of Tail- " zies. In case it might be thought that, by implication, the " superior's rights might be affected, which was the only other " interest to be attended to, this was done by an express reserva- " tion thrown in at the close of the act, that nothing in this act " shall prejudge 'his Majesty or any other lawful superior, of the " 'casualties of superiority which arise to them out of the tailzied " 'estate.' I must say, this is just what I would have expected " from the aristocratic Parliament which sanctioned tailzies. I " never could have conceived that they would have made so total " a change on the rights of superiors, as to make any act com- " pelling them to receive any series of heirs the vassal chose.

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'' This was not necessary to secure their estates for the welfare of
' their family, which is always the inductive cause of entails. I
' am aware that Erskine says, B. ii. t. 7. § 6, that a method of
' obtaining an entry, which was universally considered as a new
" limitation of the superior's rights, was established by the Act
" 1685, so that the superior is not left at liberty to refuse the
" entering of those heirs whom the vassal hath named under the
" authority of a public law; and, moreover, that the superior is
" not entitled to a composition for every heir of entail, who is
" not heir of line to him who is last infeft. These views of the
" law are rested on the case of Denham, and the opinions of law-
" yers which led to that decision; and certainly they would have
" been entitled to the greatest weight, and, indeed, could hardly
" have been got the better of, if the credit of that decision had
" not been shaken by subsequent judicial procedure. The right
" of the superior was, in that case, held so much altered by the
" Act 1685, that it was not competent for the parties even to
" stipulate that, in the event occurring of a stranger heir succeed-
" ing, he should pay a year's rent, at least he could not bind an
" heir of entail in this payment. But in the subsequent cases of
" Mackenzie and the Duke of Argyle, the Court disclaimed this
" view, and allowed a clause of reservation to be inserted in the
" superior's charter, to allow the right to be determined when the
" case should occur. We are now called upon to do so; and I
" cannot discover any thing in the Act 1685 to abridge the supe-
" rior's prior rights, even had there been no reservation in his
" favour. The powers of the proprietors alone was the subject of
" the Act, so as to make an entail effectual against creditors and
" purchasers, putting it out of the power of heirs of entail to deal
" with any such to the prejudice of future heirs. It had no other
" object. It does not enact that the superior must grant an
" investiture to such heirs as the maker chooses. It left the entry
" as before, to be the subject of adjustment between them. But
" if possible, to make this more clear, the superior's right to the

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" casualties is declared not to be prejudiced. This surely as " clearly applies to composition, as it does to relief.

" Your Lordship has examined with great minuteness the " character of this payment, and the place it holds in our law " books. You also mention, that in the clause of reservation in " the Westshiel case, the payment of composition is distinguished " from the ordinary casualties of superiority; and you conclude " that the reservation in the Act does not apply to the compo- " sition for an entry of a singular successor, but only to the relief " for an heir. As already said, I cannot believe that the Parlia- " ment 1685, wished to abridge a superior's rights, without even " any express notice that they were doing so, or that, in the reser- " vation of these rights, they did not intend to include this most " important one, the right of not having a vassal forced upon him, " not the heir of the person entered. I know very well that the " composition for receiving a singular successor could not origi- " nally be reckoned among the superior's casualties, because it " was not matter of right in the stranger, but of purchase and com- " position from the superior, whence its name, and whence also " its place in our Institutes of law; but when it could be enforced " by an appriser or adjudger, it becomes of the same nature as " any other of the casualties; it truly became a casualty; and in " truth I think the reservation more expressly referred to it than " to any other of the feudal casualties. What effect could the " entailing clauses have upon ward, marriage, or recognition? " The last it more effectually prevented; the others would occur " as before. Moreover, an entail would not exclude irritancy *ob* " *non solutum*. In fact, it was the introduction of strangers into " the series of heirs-of-entail which would affect the superior's " casualties, and therefore this probably alone called for the " express reservation. And this, I think, was effectually done " by the Act; so that whatever privilege the superior had before " the Act, as to agreeing or not agreeing to receive strangers as " heirs of investiture, he continued to have after it; and the

" entailing powers only operated in favour of the vassal, when he " paved the way for it, by receiving the superior's consent to the " admission of strangers as heirs of the investiture, and adjusting " the composition due on alteration of heirs.

" To say, because the Act authorizes the lieges to substitute " heirs in their tailzies, that this gave these substitutes, in all " respects, the character and right of heir of line to the maker, " in a question with the superior, so as to convert a mere stranger " into any other heir than an heir of provision, does not seem to " me a sound inference. The term heir, I think, will never solve " the question. Each substitute is an heir of entail, and has his " rights and character as such in reference to the maker, and the " heirs before him, and the heirs substituted after him under the " entail, which is the charter and measure of his rights. But " *quoad* the superior, he is still an heir of provision, and, if a " stranger to the former investiture, he will remain so under " the entail, until it is acknowledged unreservedly by the " superior, and an investiture in his favour made up under it. " But till then, though called as an heir in the entail, he is a " stranger to the superior, and must be dealt with as such by " him.

" I may remark, that the insertion of the clause in the supe- " rior's confirmation of the entail of Westshiel, that every heir of " entail should pay a year's rent for his entry, unless he was heir " of line to the person last vest and seised, is very strong proof " that our lawyers at that time did not hold such an heir entitled " to an entry merely by paying the relief. It appears that the " clause was twice introduced in 1726, and again in 1737, when " the judgment which forfeited the estate was reversed, and the " appellant took an entry. The composition paid had been 200*l*. " I cannot conceive a stronger illustration as to the understand- " ing of the law at this time of both superiors and vassals than " this; and it is important to observe who were the counsel who " advised the parties at that time. From the appeal cases, it

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" appears, that, besides others on one side, there was Duncan " Forbes, and on the other, the last President Dundas and Lord " Grange, during the period of his return to the Bar, after resign- " ing his seat on the Bench. These were great lawyers, and we " may presume, that, at the suggestion of the one, and with the " approbation of the others, this clause was introduced as a due " exercise of the reservation in favour of the superior's rights " in the Act 1685. I may notice, in passing, an illustration " arising out of this case: The entail which Sir William Den- " ham made in 1711 was not feudalized by him. Sir Archibald " Stewart Denham was the first heir who made up a title under " it, having irritated the right of a prior heir, and as he was not " heir of line to Sir William, he paid the composition as a singu- " lar successor. This title was set aside, and the prior heir, Sir " Robert, was found entitled to the estate, the composition being " allowed to Sir Archibald, as if paid to the superior by Sir " Robert, and the same clause was again inserted. It was held " in 1760, that, having thus acknowledged the entail, the supe- " rior was not entitled to a year's rent, when Sir Archibald " succeeded to Sir Robert, as he did, not being his heir of line. " But suppose that Sir William Denham had, at the date of the " entail, applied to the superior to give him an investiture under " this entail to himself and the heirs-male of his body, whom " failing, to Robert Baillie and the heirs-male of his body, whom " failing, to Mr. Archibald Stewart, and the heirs-male of his " body, would the superior have been bound to do so on payment of " relief as an heir? The entail was made in 1711, and the entailer " was an old man without heirs-male. He died next year. The " superior was not, if he confirmed the entail in favour of Sir " William, entering a singular successor, so that composition was " not then due as for a singular successor, while it was very clear " that it must be due at no very distant period. The superior " surely was not bound to acknowledge the entail? *That* the " interlocutor in 1760 implies, as it holds he had excluded his

" claim to refuse, and this must have been by a voluntary act of " his own. The vassal could not surely force a renewal of the " investiture, as if it had been simply to Sir William Denham, " and his heirs or his heirs-male? Therefore, I think it must " be held, that it was still a matter of transaction between the " parties, as they clearly viewed it at the time, although effect was " not afterwards given to it by the Court. Sir William Denham " could not be called on to pay composition as a singular succes- " sor, as was found subsequently in the case of Mackenzie; and " if I am right in holding that the superior was entitled to a " composition when Baillie took an entry under this entail, which " really seems not questionable, on what principle can it be said " that if he, having possessed the estate, should die without heirs- " male, and Archibald Stewart, not his heir of line, came to " succeed, he should not be liable for a composition on his entry? " It might be held that an heir of entail was not entitled to bind " a future heir in payment of this; but if a reservation of the " right to demand it be inserted when the case occurs, I am " unable to see on what ground it can be resisted as often as it " occurs.

" Considering that there is so much difference of opinion upon " the point among us, I am happy to fortify my own views, by " referring to the opinion of Lord Balgray, in the case of the " Merchant Company, 17th January 1815. He observes, 'a " ' third encroachment arose from the Statute 1685. It empowers " ' all men to entail their lands; and, by that Act, the rights of " ' the Crown, and of all superiors, are reserved. Yet the supe- " ' rior was bound to receive the heir of entail, if he were also " ' heir of line, though he succeeded as a disponee, and he could " ' not object to do so:' that is, when he received him, he was " bound to receive him as an heir, and paying relief only. ' But " ' whenever the entail went beyond the heir of the original inves- " ' titure, or called others than the heir of line, it was considered " ' that the superior's right to impose an entry revived under the

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" ' reservations in the Act.' He then refers to the cases of " Mackenzie and the Duke of Argyle, ' and the cases of the " ' Earl of Dalhousie and the Earl of Breadalbane, decided in " ' Exchequer, where the parties found caution, that, upon " ' the succession opening to the fourth son, they would pay a " ' year's rent.' This I must consider an opinion of very great " weight.

" The same observation applies to the last change made on the " rights of superior and vassal by the Act 20 Geo. II. A pur- " chaser may obtain an entry from the superior under a title, " containing an unexecuted procuratory in his favour. He was " no longer to act as an adjudger; but then it is expressly pro- " vided that the vassal must pay such fees or casualties, as the " superior is entitled to ' receive on the entry of such purchaser.' " The case here is simply the reception of the purchaser as vassal, " and the superior's casualty on his entry is to be paid before he " can obtain his title. This statute in this respect shows a due " regard to the superior's rights; its object was to take from him " a privilege inconsistent with the advanced state of the country, " and the altered condition of superior and vassal, in relation to " each other; but it went no farther, and it did not say that the " payment then made would cover any series of heirs of investi- " ture that might be introduced into an entail. To extend a " vassal's right so far, and so far abridge the superior's, was not " necessary for the object in view, and was certainly not expressly " enacted. The utmost that can be said for it is, that it is infe- " rentially deduced as the result of the two Acts, granting an autho- " ritative right to the entry of such heirs as the vassal chooses, " without expressly declaring that no casualty is to be paid on a " change of heir. The view of the Legislature seems to have been " all along the very proper one, to grant a privilege to vassals " trenching as little on the superior's rights as possible, when both " are compatible. It is quite compatible to allow the entailing " on a series of heirs, and not defeat the right of the superior to

" a composition as often as a stranger succeeds as heir of provision; " and therefore, upon the whole, I concur in the views of the " majority of the consulted Judges.

" LORD MONCRIEFF.—This is undoubtedly a question of " importance. It was once decided in Lockhart against Denham, " July 10th, 1760; and, notwithstanding all that has since " occurred, I still think that case, rightly considered, an authority " of very great weight. But if the discussions which have since " taken place have the effect of rendering the material question " still an open point, subject to the force of all the authorities " together, though in none of the latter cases, except that of " Baillie, did the facts require or admit of a judgment on the " point, at the least I cannot hold it to have been determined in " opposition to Lockhart, and the express authority of Erskine, " by any thing which took place in the case of the Duke of " Hamilton against Lord Hopetoun, which appears to me to have " been different from the present case, in the essential facts on " which it depended, and which did not admit of any judgment " on the question which the Court are here called upon to " resolve.

" On principle, I can find no solid distinction between the " case of one heir of an investiture and that of another; between " one series of heirs, not the heirs of the old investiture, who are " once established in the superior's charter, and any other series " so established. Whether they are natural heirs to one another " or not, they are all heirs of the investiture, and enter as heirs of " provision.

" The case is,—That there is an entail by Miss Ewart (who " was fully entered) to herself in liferent, whom failing to William " Cossar, &c., with a procuratory of resignation. He resigned, and " got a charter engrossing the entail, on paying the composition " of a year's rent. This was right. But, once done, the entail " was sanctioned as the ground of the investiture, and all the " heirs as heirs of provision under it. The superior had no power

" to refuse the charter in these terms. He was bound by the " statutes to grant it, the composition being paid. He could not " refuse, on the ground that the granter exercised the statutory " power of imposing the conditions of an entail. This is not the " question argued. The superior would not have been allowed " to insert a clause, binding the heirs of tailzie, who might not be " heirs of line of their predecessor, to pay a year's rent on enter- " ing;—not such a clause as that which occurred in the case of " Lockhart. All the decisions together import, that the utmost " admissible was a mere reservation of such a question, leaving it " open on both sides. Cossar might have taken infeftment. But " he held on the open charter. Still Lord Balgray took the estate " as heir of provision to him, by service. He was no assignee of " Cossar to whom the charter was granted; a fact very material " with reference to the case of Lord Hopetoun. He was the heir " specially, and nominatim, recognized as such in the charter. " Lord Balgray was infeft on the charter; as the vassal of inves- " titure, taking, not as assignee, but as heir. No composition " could be due then, on any supposition. Yet it must be said, " that, as he was not an heir of line or heir-male of Cossar, he " would have been bound to pay it, if Cossar had taken infeft- " ment, his not doing of which was a mere accidental circum- " stance. Lord Balgray dies without issue. The defender is " heir of the investiture nominatim; and the question arises, Is " he bound to enter as if he were a disponee or singular successor, " paying a year's rent? because he is not the *heir of line*, or an " heir by blood of *Lord Balgray*.

" The plea-in-law for the pursuer is very vague: That, in the " circumstances condescended on, the defender is bound to pay a " year's rent. It is not made precise in the pursuer's case, p. 29. " He speaks of '*the heir of the last vassal*.' He does not say the " heir of line, nor does he exclude the case of *heir-male* general " of the last. He leaves it doubtful, whether his plea limited to " total strangers or not. But I understand the pursuer to mean

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" his ground to be, that the defender is not heir of Lord Balgray " by blood; not, that he is not heir of Cossar, the institute of the " entail and the charter; nor, that he is not an heir of the " entailer. It is put on his not being heir of blood to the *last* " *person infeft* as heir, though that person was himself a stranger " both to the entailer, and to the first heir or institute. It so " stands by the clause of reservation, which puts it on the heir " succeeding not being heir of line of the last heir. There is " another peculiarity in the conclusion of the pursuer's case,—That " the defender must accept of a charter with a similar reservation. " But, suppose the composition were due by the first extraneous " heir, it might be a question, whether that must be continuous. " Yet I understand the plea to be, that it must apply to every " such heir successively.

" In this state of the case, I look for the law necessary to " support such a claim. And I may just observe, before going " farther, that it appears to me to be a claim totally different in " principle and character, from anything to be found in the " opinion incidentally delivered in the case of the Duke of " Hamilton *v.* Lord Hopetoun, on which the chief reliance is " placed by the pursuer.

" It is not necessary to go into the ancient history of the law, " the state of it now in the essential points being clear. 1. By " the Act 1469, a superior was bound to enter apprisers on pay- " ment of a year's rent. 2. By the Act 1669, c. 36, he was " bound to enter adjudgers on the same footing. It is unnecessary " to observe, that thereby the investiture was fundamentally " altered, without the consent of the superior. 3. But by 20 " Geo. II. he became bound to enter all disponees on payment " of the usual 'dues and casualties,' which provision has been " understood to mean, the composition of a year's rent in the first " instance, and the casualties afterwards falling due. Entries or " renewals of the investiture, under the force of these statutes, are " totally different from an original grant. But 4. By the Statute

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" 1685, c. 22, all proprietors became entitled to make tailzies of " their lands and estates to any series of heirs that they pleased, " and under such conditions and clauses irritant and resolutive as " they might think fit, but with a provision that the Act should " not militate to the prejudice of superiors of the casualties of " superiority. I understand it to be undoubted law, that, what- " ever reservations it may be competent to insert in the charter, " the superior cannot refuse an entry upon such a title, or object " to it on the ground that it contains clauses irritant and resolu- " tive. I do not understand, that any point is here raised on this " subject. But I may observe, that, if the superior were entitled " to object on account of the entailing clauses, the time for settling " any such question ought to be, when the charter is first " granted constituting the new investiture. The Duke of Hamil- " ton was in that position in Duke of Hamilton against Lord " Hopetoun, and the opinion delivered in that case, whatever " may be the effect of it, had precise relation to that position. If " there were any equity for a consideration being paid to the " superior, because of the effect of the entailing clauses, it could " only be at first,—for something to be paid, besides the compo- " sition by the institute as disponee. If the entail has been " acknowledged by the superior without any reservation of such " a claim, the investiture is constituted, and has become, by the " act of the superior, the law of the feu; and as to the clause of " reservation in the statute of the superior's casualties, I concur " in the commentary of the Lord Justice-Clerk.

" And, with reference to the present case, if the estate may " be effectually entailed, so that no alienation can ever take place, " what intelligible interest can the superior have in the particular " nature of the destination? If the vassal may tie up the property " for ever to any number of heirs, ending with the Crown, what " is it to the superior whether these heirs shall be heirs of blood " to one another, or successive serieses of strangers, but all called " as heirs, one after another. I agree in the observation of Lord

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" Kaimes, that, if the superior suffers, it is by the inevitable " effect of the power to make such an entail.

" When I look to the law, as it stands upon the authorities, " I can see no ground for the present claim; and I think that, if " it were sustained in the form in which it is maintained, it would " introduce great confusion in the practical application of the " principles which regulate the subject.

" All the cases settle this generally, that persons who are heirs " of the last infeft are entitled to enter on payment of the relief, " only as heirs, although they succeed in virtue of special desti- " nations.

" The case of Mackenzie is particularly strong on this point. " For the question arose with the first heir of tailzie, asking, for " the first time, a charter upon the entail: and he was found " entitled to the charter as an heir, because he was the heir of " the former investiture; with only a reservation of any claim " against future heirs, but reserving also their defences. The " reservation in that case was of a very peculiar nature; because " not only the entail had never been acknowledged by the supe- " rior, but no composition had yet been paid for the change of " the investiture. It was, in like manner, determined in the case " of the Duke of Argyle, that the heir of entail was entitled to " enter as an heir, though the superior was permitted to insert a " similar reservation of the question as to future heirs. I shall " again advert to these cases more particularly. But, though a " question of this kind may stand reserved, it still remains to be " considered, what the nature of that question is, and what the " merits of the claim are, when the occasion arises for considering " them. The Court have constantly refused to sanction any " reservation directly recognizing the validity of the claim. " Accordingly, the reservation, in the present case, is merely, that " the superior shall *not be precluded*, by granting the charter, " from any claim which *he may have at law* for a full year's rent, " whenever the heir of entail succeeding shall not be heir of line

" of the last entered and infeft. It will be observed, that the " pursuer does not venture to make a claim to this precise effect; " and, as I understand the opinions which differ from mine, it is " not held that the composition is due wherever the heir of tailzie " is not the *heir of line* of the last infeft. The doctrine now " maintained is much more peculiar and abstract,—that the ques- " tion depends altogether on whether the heir of provision asking " an entry is, in any manner, related by blood to the predeceasing " heir. This is a very different proposition from that advanced in " the summons in this case: and I must own, that it is a propo- " sition for which I can find no authority in the law. It is in " no institutional writer, and in no decision with which I am " acquainted. Even the incidental opinion, in the case of the " Duke of Hamilton against Lord Hopetoun, is, as I have under- " stood that opinion, utterly at variance with it. That seems to " intimate, with reference to the special case, that the heirs called " by the charter claimed on by the assignee of the procuratory, " must all be heirs by blood to him. It happened that it was so " in that case, which excluded the point, and withdrew attention " from the peculiar qualification of the opinion. I understood it " merely to indicate, that a tailzie by the assignee to strangers " would be a different case. But that is a very different matter " from the plea in the present case.

" When we look at the authorities, the first thing which pre- " sents itself is the express doctrine laid down by Erskine. The " question reserved, even if the pursuer be allowed to rid himself " of the peculiar conclusion above alluded to, is distinctly this, " whether the heir of a special investiture already in the titles " derived from the superior must enter as a singular successor, if " he be not an heir by blood to the last entered vassal. Then " what says Erskine to that doctrine? (*Ersk.* ii. 7. 7.) ' Yet " ' where a proprietor entails his lands, the superior is not entitled " ' to the composition of a year's rent from every successive heir " ' of entail, who is not heir of line to him who stood last

" ' infeft, on pretence that he is a singular successor. The heir
" ' of the last investiture cannot be called a singular successor;
" ' and he is founded in a right to demand an entry, upon
" ' payment to the superior of the sum due to him by law, in
" ' name of relief, upon the entry of an heir.' Then as to
" Erskine's authority, it is true he refers to the case of Lockhart.
" I am not satisfied that that is not very high authority; but the
" first authority is in Mr. Erskine's own work. He so held it;
" and to this hour there is nothing to contradict it. The utmost
" is a permission to keep the point open. Mr. Bell is incorrectly
" referred to. He merely says that the question is undecided.
" Then consider the state of the cases,—1*st*, Lockhart *v.* Denham
" —I think it remains a decision of great importance. Divested
" of specialities, the heir of entail had taken a charter on a procu-
" ratory of resignation, with a very special clause of reservation.
" An attempt was made to *decide the point* on the *charter*, on the
" ground of the reservation being made a condition in the title.
" The real question there was whether that was consistent with
" law. It was pleaded that the *heir of entail* could not be bound
" by the acceptance of the charter by another. But, besides,
" what power had the superior to insert the reservation if he was
" bound to grant the charter? Therefore, it could have no effect
" but as a *reservation* of the *question*. The idea, in the later
" cases, seems to have been, that the Court refused to acknowledge
" it even as a reservation, because they found, that, in respect the
" entail had been acknowledged, the claim would not lie. But
" I doubt the correctness of this. I suspect that the idea was,
" that the imperative nature of the clause, once put in the inves-
" titure, should have been binding, being unreduced. But it may
" have been otherwise. The Court may not have regarded the
" reservation. But surely, if with such a clause they still held
" *on the merits* that the heir of investiture was entitled to enter
" on payment of relief only, it is a judgment on the *merits of that*
" *question*, and *a fortiori* in the present case, where clearly the

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" clause does no more than keep the question open. For the " effect of the clause is *not* to qualify the charter or investiture. " The superior *could not help* granting the charter, and the clause " is merely a *salvo* by permission, to avoid discussing a question " which might be unnecessary. In the report of Lockhart's case, " the pursuer argues on the reservation as barring the defender " from objecting, *personali objectione*. The defender merely said " it was of no weight, because he does not represent the taker of " the charter. But he argues the whole merits on the footing of " the question being open. In the later cases all that can be said " is, that the question was waived as unnecessary to be decided. " In the case of M'Kenzie, it was a single composition that was " asked, and it was found not due, though the entail had never " before been recognized, because the heir asking an entry was " the heir of the former investiture. The reservation allowed " was only of the claim on the entry ' of any future heir of tailzie " ' not an heir of the investiture *prior to the tailzie*.' This is not " at all what is maintained here; and it reserved also ' to the said " ' heirs all defences against the same.' It is clear, that all that " was contemplated was the question of one composition for the " change of investiture. The opinions reported by Lord Hailes " are not favourable to the pursuer. The Lord President " evidently held the case of Lockhart an important decision. " Lord Gardenston and other Judges held the same. Lord Brax- " field says nothing against it, nor the Lord Justice-Clerk. The " reservation was agreed to, to leave the question open.

" In the case of Argyll, Lord Dunmore had offered to pay a " composition, being *institute*. The pursuer required a *positive* " *declaration* that he would not be bound to enter future heirs, " *not heirs* male or of line of the person last entered, without " another composition. The defender *offered* a reservation *of the* " *question*, and the question discussed was whether that was " sufficient? Plainly it decided nothing; but that the pursuer " was *not entitled* to frame his charter in the way he required.

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" The observation on Denham was, merely, that, so far as effect " was supposed to have been denied to a *similar* reservation as " that *offered*, it must have been erroneous. But it does not " appear that effect was so denied to it. It was only denied to " the effect asked by the Duke of Argyll. In the case of Baillie " the precise case occurred. But there was this specialty that a " charter had been granted without any special reservation, and " it was pleaded the pursuer did not represent the granter of the " charter but as heir of entail. It was indeed said it would not " decide the general question. But the point of *right* was decided. " Lord Corehouse's note is direct on the very question. I grant " that the question is reserved here; but, though it is reserved, " the question remains, how is it to be decided?—Duke of " Hamilton *v.* Hopetoun. The judgment in that case was not " meant to be adverse to the opinion in *Baillie*. But the case " was very peculiar. There was a charter to Lord Hopetoun and " his heirs and assignees. A composition had been paid. Then " there was an assignation to a series of heirs in the marriage con- " tract of his son, Earl John, all heirs *of the assignee's blood*. " There had been *no acknowledgment by the superior of any special* " *destination*, and the question was simply, whether one compo- " sition was not due for the *first* acknowledgment of the destina- " tion in the deed of assignment? That was manifestly an entirely " different question from that which here occurs. Lord Stair in " the passage which has been referred to, (B. ii. t. 3, § 59, " beginning ' as to the first case, it is a general rule,' &c.,) contem- " plates strangers as well as heirs in blood, being members in the " constitution of the tailzies he is speaking of. And your Lord- " ship reminds me, that, if the principle contended for were to be " sustained, it would throw the whole matter of making up titles " to entailed estates into confusion. At present it is impossible " to say, whether it be necessary for every heir who is a stranger " to the heir last infeft to pay composition, or whether the first " substitute of a new series in blood should pay composition. It

" is difficult to say what would be the result, if the views of the " defenders were to regulate the law; and as there are very few " entails in which new members are not introduced, whether " every substitute of a new series in blood is to be considered as " a stranger, or whether only the first. The superior asks com- " position on the succession of the first member of a new series, " but I do not well see whether every other member is to pay " composition equally with the first."

Thereafter the Court, 18th February, 1842, pronounced the following interlocutor:—" The Lords having resumed considera- " tion of the cause with the opinions of the consulted Judges, in " accordance with the opinions of a majority of the whole " Judges, find that the pursuer is bound to receive and give an " entry to the defender as an heir of the investiture, on payment " of the ordinary casualty of relief; and remit to the Lord Ordi- " nary to proceed farther in the cause as to his Lordship shall " seem just, and find no expenses due to either party."

The appeal was taken against this interlocutor.

The *Lord Advocate* and *Mr. Moir* for the Appellants.—The ancient law was that no change in the investiture could be made without the consent of the superior, and that on failure of the vassal's heirs, the feu reverted to the superior, *Ersk.* iii. 10, 2. That rule is still in force, unless in so far as it has been modified by statute. The Act 1469, cap. 36, gives apprisers right to demand an entry, but only on payment of "*a zeire's* " *maill*" of the lands. The same right is given to adjudgers by 1669, cap. 18, and to purchasers at judicial sales, by 1681, cap. 17, but each of these statutes gives the right only upon the same payment as in the case of apprisers, viz., a year's rent. Then came the 20 Geo. II., cap. 58, which took away the right of the superior to control the investiture, and gave heirs and singular successors a method of compelling an entry by letters

of horning; but although the statute thus compelled the superior to acknowledge a change in the investiture, it did not impose any obligation upon him as to the terms upon which the entry was to be given. On the contrary, it declared that he should not be obliged to obey the charge, unless the charger should tender to him "such fees or casualties as he is by law entitled to re- "ceive." This leaves the amount of fees and casualties to be demanded just as it was previously.

Previous to the passing of the Act 1685, cap. 22, which enabled vassals to entail their lands upon a series of substitutes, whether strangers or of blood, by effectual fetters against alienation, superiors had little interest to protect themselves against the admission of strangers under the ineffectual destinations then in use, as the destination was almost sure to be defeated before it came to the stranger. That statute, however, gave the vassal the power of fencing the destination against alienation, and of forcing the superior to acknowledge an investiture which might include any number of singular successors. This statute is also silent, however, as to the terms upon which the superior is to enter the heirs of entail, and might have altered materially the position of superiors in this respect, unless provision had been made for their protection, but it declares that it shall "not pre- "judge lawful superiors of the casualties of superiority which "may arise to them out of the tailzied estate." This declaration cannot have any other meaning than as a reservation of the superior's casualties, and a declaration that, although his common law-rights had been touched so far as to force upon him the recognition of an inalienable feu, his right to those casualties was untouched.

It is evident, therefore, that none of the statutes have in any way infringed the superior's rights at giving an entry, though they have compelled him to give entries to which he was not previously compellable; and therefore, although he cannot now refuse to give a charter under an entail with strict fetters, yet his right remains as before, to demand from every heir, a

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stranger in blood to the party last entered, the composition payable on the entry of singular successors. Though the heirs of entail are heirs of provision, yet where not heirs of line, they are singular successors in every sense of the term. In Argyll *v.* Dunmore, *Mor.* 15,068, it was held an institute of entail not being the heir of line, was bound to pay a year's rent; and there is no principle why a substitute should be in a more favourable situation.

An entail is in substance an alienation to strangers by anticipation, and each substitution which departs from the line of the vassal last entered, is a repetition of the alienation, and the substitute asking entry is a disponee or singular successor, and bound to pay a composition accordingly. In Lockhart *v.* Denham, *Mor.* 15,047, it was held that the superior was bound to enter heirs of entail, not heirs of line, as heirs and not as singular successors, but that proceeded entirely on the fact of the superior having acknowledged the investiture; and, moreover, the decision has always been considered of questionable authority, and not as deciding the question; but at all events, in the present case the charter given to the last vassal entered, expressly reserved the superior's claim to a year's rent, when the succession should open to an heir of entail not an heir of line. In McKenzie *v.* McKenzie, *Mor.* 15,053, the vassal was the lineal heir, and in right under the feu as it stood before the entail. The Court expressed itself dissatisfied with the decision in Lockhart *v.* Denham, and while they found that the superior was bound to enter Sir Hector McKenzie upon payment of a duplicand of the feu duty, they inserted in their interlocutor a reservation pretty much in the terms of that in the last charter in the present instance, which shows conclusively that Lockhart *v.* Denham was not held as having decided the general question. But this is shown even more distinctly in Argyll *v.* Dunmore, *Mor.* 15,068, where an institute of entail was willing to pay a year's rent as a singular successor, but the superior refused to receive him, unless he would consent to a reservation in his

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charter of a right in the superior to refuse to enter the substitutes of entail not heirs of line, unless upon a similar payment. If Lockhart *v.* Denham had been held as deciding the general question, then the discussion as to this reservation could not have arisen; the payment offered by the institute would have enfranchised all the substitutes, and the institute's right to refuse insertion of the reservation would have been indisputable, but the Court, while they rejected the reservation proposed by the superior, directed the insertion of a general reservation of the superior's rights. In Hamilton *v.* Baillie, 6 *Sh.* 94, the superior was obliged to enter an heir of entail as an heir, but that proceeded on the fact that the superior had granted a charter without reserving any claim on future heirs, and that possession had been had upon that charter for forty years. Hamilton *v.* Hopetoun, 1 *D. B.* and *M.*, 689, N. S., merely decided that a purchaser was entitled to an entry on payment of a year's rent, but that the destination must be confined to his heirs at law.

[*Lord Cottenham.*—If you are to look to the heir of the investiture, a younger son would not be such before an elder one. Would the superior be entitled to a year's rent in that case?—If he would not, the reservation could not give him the right.]

Yes, but the question was not as to the heir of the entailer, but of the first party who took investiture under it.

[*Lord Cottenham.*—It was not so understood by the Judges.]

There was no question in Hopetoun's case between the heirs of the maker of the deed, the question was with the heirs of the party having the investiture. It was there held that a party taking assignment of the precept before infeftment, is entitled to take up the investiture, and introduce his own heirs. Here Cossar was a stranger to Miss Ewart, and so was Lord Balgray. Lord Balgray being a stanger, took the first entry, and it is he who asks the introduction of the respondent into the investiture.

Mr. Turner and *Mr. Anderson* for the Respondent.—I. So far

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as the claim of the appellants is founded upon the reservation in the charter granted to Cossar, it must be admitted that the respondent is an *heir* of entail, and not a singular successor, the clause itself *ex hypothesi* of its application, gives him that character, and the summons, both in its narrative and its conclusions, proceeds on the footing of his possessing such character. By the charter, the heirs of line of Lord Balgray not being heirs of his body were excluded, and the right of succession then devolved to Robert Ewart, and the heirs male of his body. Lord Balgray died without heirs of his body, the succession therefore is in *hereditate jacente* of his Lordship, and can be taken up only by the party who has the character of heir under the investiture, —in no other character can it be taken up. Moreover, when Cossar resigned upon the procuratory in the deed of entail, the warrant for such resignation, he could do so only in the terms of the warrant, that is, for infeftment to be given to the series of heirs prescribed by it; and the superior, when he gave a charter upon the resignation, must have given it in favour of the same series, and that excluded the heirs at law not being heirs of the body of both Cossar and Lord Balgray, and on failure of the heirs of their bodies admitted the respondent.

If the respondent then take under the investiture, and under it alone, he has every character of an heir, and none of a singular successor, who, in the definition of Craig is, "*is qui immediate* "*non est successurus ratione habita ad id tempus quo investitu-* "*rum accepit.*" It is only by special service as heir that the respondent can take up the succession, and the 20 Geo. II., cap. 50, assumes the production of a special retour to be the criterion of the character of heir. If then the respondent be heir of the investiture and entitled to an entry as such, it can be only upon the terms upon which an heir is entitled to an entry; that he is heir of provision and not of line, makes no difference in regard to these terms upon any authority which can be produced; though not the heir of line, he is not the less the heir of the

investiture. All the grounds upon which relief duty is described as being payable by an heir, (*Ersk.* ii., 5, 47; ii. 7, 5, 6 & 7; *Stair*, ii. 4, 26 & 32;) are alike applicable to an heir of entail or of provision. The entry is given to him as to one whom the investiture points out, and in conformity with feudal custom; and not, as in the case of a singular successor, to one unknown to the investiture, but whom the statutes, infringing upon his original right, forces upon the superior.

II. That the entail under which the respondent claims to be entered, contains fettering clauses, which, so long as the line of succession prescribed is unexhausted, will prevent the admission of singular successors, and the falling of the casualties which would thereby accrue to the superior, will not support the superior's claim, is admitted. The opinions delivered by the consulted Judges in Hamilton *v.* Hopetoun, 1 *D. B.* & *M.*, 689, show this to be incontrovertible. The Act 1685, cap. 22, allows vassals to tailzie their lands upon strangers, but makes no provision for any such fine. A strict interpretation of that Act, therefore, would warrant the position that the superior is not entitled to a composition even on the entry of strangers under the investiture, and such appears to have been the opinion of *Ersk.* ii. 7, 6 & 7. However this may be, the superior cannot be entitled to a recompence for admitting strict fetters into the investiture. Anciently, before vassals came to have the power of alienating the feu, and before the Crown had acquired the right of *ultimus hæres*, superiors could prevent tailzied destinations, because they altered the succession, *Craig*, ii. 16, 20; *Stair*, ii. 3, 43. Now that the law is changed in this respect, they cannot ask a recompence, on the very opposite ground that strictly fettered entails prevent the sale of the feu, and the frequent alteration of the investiture. And if the superior must recognise the entail, the injury to him is the same whatever be the series of heirs. His exclusion from the chance of a composition is as effectual where the fetters are laid

on the old destination, as where that is discarded, and the estate devolved on a new series of heirs; and therefore, if the insertion of the fetters gave the superior any right of claim, the claim would apply to all entails, whether in favour of heirs of line or of strangers; yet it is indisputable that the vassal is entitled to introduce the fetters of an entail into the destination, provided he does not alter the course of succession, without the superior being entailed to make any demand; that was settled in McKenzie *v.* McKenzie, *Mor.* App. 2, vo. Sup. & Vass. In Hamilton *v.* Hopetoun, 1 *D. B.* & *M.* 689, the opinions of the consulted Judges was express against any claim by the superior for the mere insertion of fetters into the investiture.

III. Previously to the Statute 1685 the vassal had acquired the right to name the heirs to the feu, and to change the succession from the legal to an arbitrary line, *Stair*, iii. 4, 2, 20 and 23, and ii. 3, 43. The mode by which the vassal could compel compliance from the superior with this nomination was by adjudication, and the heirs introduced in this way stood in the same relation to the superior as the heirs they displaced; and so far were the heirs of the adjudger from being liable to be treated as singular successors, that until the Act 1669 even the adjudger himself was not liable in any composition, *Stair*, ii. 4, 32. After the Act 1669 the heirs of the adjudger continued free from liability, for it made the Act 1469 the rule of the superior's right, and by it a year's rent was payable only on the entry of the appriser himself.

The Act 1685, though perhaps it had chiefly in view the making fetters of entail effectual, nevertheless confirmed this power of nomination in the vassal when it gave the vassal power to tailzie his lands and to substitute heirs. Under the statute the superior cannot refuse to grant a charter upon an entail, whatever may be the series of heirs, and unless any infringement thereby occasioned upon his rights is saved by the clause of reservation in the present charter, there is nothing in the statute

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itself to save it. No doubt the statute saved the casualties of superiority, but the right of naming heirs, which originally was an ingredient in the *dominium directum* afterwards detached from it in favour of the vassal, was never a casualty of superiority. The casualties of superiority, such as relief, are *debita fundi*, and may be made effectual by poinding of the ground. Composition is a mere personal debt, which cannot be enforced against the lands. The object of the statute plainly, therefore, was to save the former, not the latter. When the vassal exercises his right of nomination in such a way as to bring strangers into the investiture, no doubt the superior is entitled to a composition upon such change, but there his right stops; when the composition is paid in respect of the change his right is satisfied, he cannot control the series or class of heirs in whose favour the change is made. Here Cossar paid a composition for the alteration in the investiture, and thereby he enfranchised all the heirs called by the change. When that change is in favour of strangers in blood, the superior's chances of gain are not diminished, the fetters of the entail being left out of consideration, for the chances of a change in the investiture are evidently much greater where the heirs of provision are not the legal series. If the fetters are taken into consideration, no doubt the superior's interests are affected, but the loss is through them, not through the particular choice of line, for the fetters equally prejudice him whether they be in favour of the line of legal heirs or depart from it.

So far as regards the present question, an heir of the blood not being the heir of line is in identically the same position as an heir of provision not of the blood; they neither of them take according to law, or by the provision of the law, but by the will or by the provision of the entailer, and they must both take by the same form, service, and retour. There may be a class of persons who might successively be entitled to the character of heir-at-law, but only one person at a time can enjoy

that character; all others, however near of blood, have no more right as heirs than the most perfect stranger. But the sole criterion for determining whether relief duty or a composition is payable, is whether the party asking the entry is heir by the charter, for if he is not he is not heir at all. However near the party may be in blood, if not the heir in the charter, he can obtain an entry only as a singular successor.

Lastly, even if the respondent were a singular successor, it would not follow that he must pay a composition for an entry, that payment is strictly statutory, and therefore demandable solely from those parties upon whom the statute has imposed it, as was found in regard to adjudgers, previous to the Act 1699, in Grierson, *Mor.* 15,042, and in regard to Crown donators, in Gordon, *Mor.* 15,050. But there is no statute which imposes this payment upon a party claiming an entry under an investiture, because he is a stranger in blood to the vassal last infeft. If it be payable, therefore, the vassal must be at the mercy of the superior, as to its amount, for there is no authority for making it a year's rent more than any other sum. The right, if it exist, then, must be by the common law, and be universal; but there is no trace of the claim at all until the case of Lockhart *v.* Denham, although entails were known long prior to that time; neither is there any mention of it in the institutional writers prior to that time.

In Lockhart *v.* Denham, *Mor.* 15,047, there was a special obligation on the heirs of entail to pay a year's rent when not heirs of line, which was stronger than the reservation in the present case, but the Court refused to give effect to the obligation, and though they did so mainly upon the ground of defence set up by the heir, that the heir who had allowed the obligation to be inserted in his charter had no power thus to bind the substitutes, this was in truth to negative the superior's claim to the payment, and in this view it is a direct authority. In Mackenzie *v.* Mackenzie it does not appear that the superior claimed a suc-

cession of compositions, but one composition from the institute, because if he gave an entry under the entail he would be deprived of a composition so long as the entail endured. Accordingly the Court refused the claim as against the institute, because he was heir under the former investiture, but reserved it against any future heirs who should not be in that position, so that this case in truth confirmed Lockhart *v.* Denham. In Argyll *v.* Dunmore the present question was not decided either way, it was simply reserved; and Hamilton *v.* Baillie was decided on its own specialties, but the opinions expressed, especially by Lord Corehouse, were strongly against the appellant's claim.

LORD BROUGHAM.—Miss Grizel Ewart being seized in fee simple of the estate of Allershaw, and having completed her title to it by charter of confirmation from the superior in 1796, executed an entail of the same in 1802, which in 1811 was duly recorded. By this tailzie she settled the estate upon herself in life rent, then upon William Cossar, her cousin, and the heirs male of his body, whom failing, upon Lord Balgray and the heirs male of his body, whom failing, to the heirs general of his body, whom failing, to Robert Ewart, her great-nephew, and the heirs male of his body, whom failing, to other series of nominees, which it is unnecessary to enumerate. This entail is made strict by the usual fencing clauses against sale, contracting of debt, and alteration of the order of succession, and no question arises as to the strictness of those fencing clauses.

Miss Ewart died in the year 1811, before the tailzie was recorded, and was succeeded by William Cossar, who took the name of Ewart, according to the conditions of the tailzie. He resigned into the superior's hands, by virtue of the procuratory in the original tailzie, and obtained a charter of resignation in favour of himself and the heirs of the investiture. The reddendo clause specifies eighteen merks to be paid yearly in lieu of feu duty formerly paid, and also stipulates for the payment of the double of

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such feu for each heir's entry; and a right of poinding is given in case of non-payment, which non-payment, it says, shall work no forfeiture.

This charter contains an important saving clause (when I say "important," I mean important on account of the argument which has been raised upon it, because the reservation of what is a man's right by law does not seem worth much; he would have his legal right whether it was reserved or not). It will presently appear how it operates—reserving all claims of the superior and his heirs, which they may have at law, for a *full year's rent*, whenever the heir of entail to whom the succession may open, *shall not be the heir of line of the person last entered, and infeft by the superior* or his heirs. A composition of 486*l.* being a full year's rent, was paid by William Cossar to the superior on this occasion. He died without taking infeftment on this charter of resignation, and leaving no heirs male of his body, he was succeeded by Lord Balgray. His Lordship was served heir of tailzie and provision, in June, 1818. He took up the unexecuted precept in the charter, and was infeft under the reservation which has been mentioned. He died in February, 1837, without heirs of his body, and the respondent, Robert Ewart, was served heir of tailzie, and provision to him. It is a fact in the cause admitted, that he was not heir of line, nor stood in any degree of relationship to Lord Balgray, the person last seized. He was a relation of the entailer, but a stranger to the person last seized. The appellants are the superiors, and they brought their declarator of non-entry, calling upon the respondent, Robert Ewart, as heir of tailzie and provision, to enter; and on his refusing, calling upon the Court to have it found and declared, that the lands are in non-entry by reason of Lord Balgray's decease, and shall so continue until entry of his heir or of his legal disponee, and that therefore they have a right as superiors to the bygone non-entry dues.

The question, therefore, intended to be raised by the action, and which it does raise, is whether or not the appellants as supe-

riors are bound to enter the respondent as vassal, upon payment of the ordinary relief payable by the heir of the vassal last entered, or only to enter him as a singular successor, on payment of a full year's rent.

An objection was taken by the respondent, the defendant in the Court below, and a good deal insisted upon there, that this was not the competent form of action for trying such a question of the right to a year's rent. But that objection may be taken to be now abandoned. It is not urged in the respondent's cases here, it received no countenance from the learned Judges below; indeed, the only two who refer to it, the Lord Justice Clerk and Lord Medwyn, though differing widely from one another upon the merits of the question itself, both in express terms declare against the validity of this preliminary objection. None of the other eleven Judges make any allusion to it. Lord Meadowbank agrees in every respect with the Lord Justice Clerk, who had declared against the objection. In a word, all their Lordships either decide or assume that the objection has no force at all.

We are therefore brought to the merits of the question itself. It is one of great importance, and its difficulty is testified by this remarkable circumstance, that the narrowest possible majority of the learned Judges below has pronounced the decision now appealed from, there being seven in its favour, and six against it, and that the decision would have been the other way, and by the same majority of seven to six, had not one of those learned persons changed his opinion in the course of the proceedings, that is to say, abandoned the opinion which he had formed upon hearing the case argued, in consequence of reconsideration, and of the arguments used by the consulted Judges and the permanent Lords Ordinary. It is now then necessary to dispose of this main and only question in the cause.

It cannot fail to strike in the outset any one who attentively considers this argument here, that they who maintain the appellant's case, the superior's claim, are in two particulars driven to

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setting up very arbitrary propositions. First they assume, that if any composition, any extra payment is due, it must be one year's full value; and next they take no distinction between the next heir of line, the heir of law independent of the entail, the only one indeed who can be called an heir of line, and all the other heirs of the blood of the party last seized; but they do take a distinction between all heirs of the blood, and all other persons succeeding under the entail, holding that each and every of them stands in a position different from each and every heir of the blood. Both these positions appear to labour under the grave suspicion of being invented to suit the contention of the superior, for each is in itself arbitrary and gratuitous.

First, the taking one year's value is only derived from the rule of taking it when the superior accepts the tailzie by the first charter which he gives, carrying the feu to persons not of the original investiture and of his first grant. But it by no means follows that the same rule is to apply where he subsequently admits any person under the new investiture, and only follows out that for which he had been paid his composition. The year's value first taken, is derived from the ancient right of the superior while he was not as he now is, a mere instrument of conveyance, and while he had some option in the matter of granting or refusing a charter.

But the second assumption is more important, and is found to be too strong for some of those learned persons below, who yet agree with the minority in the Court below, and support the claim of the superior. It is too strong for them, and they repudiate it, although they agree with those who come to that conclusion upon that question. It is contended, or rather it is taken for granted by the argument of others, that it is one thing to admit under an entail an heir called to the succession, who is related by blood to the person deceasing, and another thing to admit an heir called to the same succession in the same tailzie, but who is a stranger in blood to the person last deceased. The

latter, a stranger in blood, is likened to, nay, is in terms called a singular successor, while the former is treated for the purpose of this argument as rather an heir than a singular successor. I particularly refer to the argument, very short indeed, but very able as it always is, of the very learned and ingenious Judge, Lord Fullerton. Now, it appears to me wholly impossible to go along with this position. The person succeeding by the tailzie out of the turn which he would have at common law, is as much a singular successor as a mere stranger in blood. He serves as heir not of law or of line, but of tailzie and provision. He takes not as heir, but as purchaser. He succeeds, not by law, but by the law of the feu, that is, in this case, of the tailzie. He may be the second son of the person last seized, and yet be as much a singular successor as if he had not a drop of his blood in his veins.

Now, this seems to have been clearly perceived by some of the learned Judges who agree with Lord Fullerton in supporting the superior's right. Lord Fullerton, differing wholly from Lord Jeffrey, takes this more accurate view of the matter, and holds those strangers in blood to be, as they most clearly are, heirs male out of the investiture, while Lord Jeffrey will not call such persons heirs at all for want of blood, but terms them disponees or singular successors. It is however worthy of observation, that Lord Jeffrey's opinion is extremely short and general; he contents himself with a general acquiescence in Lord Mackenzie's opinion, who preceded him, and goes at no length himself into the argument, while Lord Fullerton has very fully argued the point. Lord Mackenzie falls, though not so entirely, into what I take leave to regard Lord Jeffrey's erroneous view of this fundamental matter. But then I must so far agree with both these learned persons, and differ with Lord Fullerton, that I do hold this position—what I call this erroneous position—to be fundamental, and that I am wholly unable to see how the superior's claim can be maintained on any other view. The heir of the

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investiture, the person called out of his order by force of the tailzie, is a singular successor, to all intents and purposes, whether he have the blood of the person last seized in him, or is a stranger. They who maintain the contrary, are bound to show book for it, and they have not done so—they have shewn no book.

I may here dispose of the argument raised upon the reservation. The superior rests upon that very clause, not denying that but for its import and operation he can have no ground to stand upon. Now, to what does it amount? The superior reserves all right to this casualty, or payment. (I see one learned Judge, the Lord Justice Clerk, argues at length against its being a casualty, on which I give no opinion, for it is not necessary farther than to say, that his Lordship's argument has not at all satisfied me that it is not a casualty, but the point needs not here be settled.) The superior reserves all such right as he may be found to have, nothing more. He saves such right as he may *have by law*—no more. Then to what does this amount, but to a reservation of the right, if by law it belongs to him, but leaving the question open to be determined when it arises? And this too may be said of the cases relied upon mainly by the superior; they only deal with what it was necessary for the Court in each instance to determine, they go no further than was necessary, they tell the parties you have such and such rights clearly and at present, and the further matters shall not be deemed and taken to be needlessly concluded by any thing now adjudged, but must be dealt with hereafter, when it becomes necessary to decide upon them. And to show more clearly that such is the true character of these decisions, it may be observed, that sometimes, in taking this course, which is quite decisive upon what the meaning of the Court is, there is a saving also added of all objections competent to the claim so reserved; they not only reserve the claim of the superior, but they also reserve all competent objections to such claim, and further than that in one case, the decision in Lockhart *v.* Denham, which is most important, that is the Westshiell case,

is to all appearance criticised, observed upon rather than objected to, still less overruled, but commented upon as it were for having gone further than was necessary, and having disposed of a point which the case before the Court did not require to be disposed of.

This general remark may be thought to suffice upon the cases which the superior relies on. But it is fit that we go further into them; and when we come to examine the authorities, we really do find that, justly considered, the balance is all on one side. It is not at all too much to affirm, notwithstanding all the elaborate and subtle arguments on this case, that there is no one authority either of a text-writer, or a decided case which supports the appellant's contention.

I entirely agree with Lord Moncrieff and other learned Judges, in considering the passage in Erskine as of the greatest importance. It is, as the Lord Justice Clerk well observes, not a single statement of opinion, it is repeatedly given by that very learned author, the Professor of Scotch law, and one intimately acquainted with feudal principles. It is a clear and an unhesitating, and an unqualified opinion, or rather, which augments its weight, it is given as a known principle, and not as a matter of any doubt or controversy, upon which, however, had any dispute existed, his opinion would, as such, have been entitled to the greatest respect. But he states it as known law, and no matter of controversy at all. "The superior," he says, "is not entitled "to the composition for every successive heir of entail who is not "heir of line of him who stood last infeft, *on pretence that he is a* "*singular successor*," as if he had foreseen the present argument, and wished to furnish previously an answer to it. He goes on to say, "he cannot be called a singular successor; he is heir of the "investiture." Now, it is plain that this learned writer would not deny that in one sense he is a singular successor; he is not heir at common law; but what he plainly means is this, that if he be singular successor, he is so in company with all the heirs, who having the blood in them of the last person seized, yet not

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being heirs at law, succeed by force of the entail. They are all in one sense heirs, namely as heirs of the investiture. In another sense, they are singular successors, that is, they do not succeed as heirs at law, but in both senses they stand in the self same position and relation to the feu. If one is heir, so is the other—if one is purchaser (singular successor), the other is so too.

But it seems this opinion, or rather this authoritative statement of Mr. Erskine, is entitled to little deference, because it cites as its support the case of Lockhart *v.* Denham, then, it is said, recently decided. The decision was, however, thirteen years old when Mr. Erskine wrote the passage in question. It was not the day before, but for thirteen years it had been known and never quarrelled with, never objected to: it satisfied the profession. Had it not given satisfaction among conveyancers, among the learned feudists of the day, he doubtless would have stated the doctrine which it supports with some qualification. Had it not met with his own full approval and been backed by his high authority, he probably might have expressed himself differently too. But it is to be observed, that he does not lay it down as any new law first declared by that decision. Though he refers to the decision, he does not give it as forming the only ground of his statement.

Then it is said that not only was this a recent decision, but it was afterwards impeached; and one learned Judge, Lord Fullerton, goes so far as to say, that since the decision in the Duke of Argyll *v.* Dunmore, and Mackenzie *v.* Mackenzie, it can no longer be regarded as an authority. I do not at all see that either of these cases overrules the case of Lockhart *v.* Denham. Indeed, Mackenzie *v.* Mackenzie, besides that it makes very much in favour of the respondent's, the vassal's, contention, declaring the first heir of tailzie entitled to his charter *quasi* heir, because heir of the former investiture, adds a reservation of any claim against future heirs, but adds also a reservation to them, the vassals, of all competent defences against the superior's claim. And, as Lord

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Moncrieff has well observed, there was this peculiarity in the case, that the entail never had been acknowledged by the superior, and no composition whatever had been paid for a change of the investiture.

Now in the Duke of Argyll *v.* Dunmore, the other case relied on as not merely shaking, but overturning the Westshiell case, I can find no ground whatever for this assertion. The question arose with the institute, and he offered a composition. The superior required, as a further condition of entering him vassal, that a reservation, or rather an acknowledgment, should be adjected of his not being required hereafter to enter any stranger in blood without a full composition. The superior called therefore for an admission of the right in his favour prospectively, the vassal refused that, but the vassal offered a clause of reservation, that is, he offered a clause to keep the question open, such a clause as the present. But what is most material to observe, is, that the superior, now pursuer before the Court, called for a judgment in his favour, because the question raised by his action, was whether or not this offer of the vassal to insert a saving clause was sufficient. And what was the decision of the Court? That the superior had no right to a declaration in his favour, and was bound to take the saving clause as offered by the vassal. The utmost that can be alleged of this decision is, that it did not consider Lockhart *v.* Denham, the Westshiell case, as having denied all effect to a clause of reservation like the one now before us, and held by the Court to be sufficient, though denied to be so by the superior, whose contention was thus overruled by the Court. Nothing else, as Lord Moncrieff justly observes, was decided, except that the superior was not entitled so to frame his charter.

It must be remarked, that supposing the two cases of Mackenzie *v.* Mackenzie, and the Duke of Argyll *v.* Dunmore, to lay down all that they are contended to lay down respecting the previous case of Lockhart *v.* Denham, they only do so upon the

supposition that in that case a positive reservation of the superior's right would be wholly unavailing, not merely a reservation of whatever right he might by law have, which is the reservation in the case at bar, but an express clause that every stranger in blood shall pay a year's full rent. I see one learned Judge, Lord Ivory, seems to have a doubt if the Westshiell case is in this respect correctly reported. But in so far as it differs from the present reservation, the observation is very material, for it is perfectly possible that the Court, in Mackenzie v. Mackenzie, and in Argyll v. Dunmore, might say it was going too far to hold an express and unequivocal and unconditional reservation of the right of a full year's rent, at all events to be ineffectual against the vassal, who took the charter with it, and yet they might contend, and might most consistently hold, that the superior was not entitled, under a reservation like the one here, namely, a reservation only of all the right which the superior has by law, a reservation which merely keeps the question open.

It is further material with this view to remark the pregnant observation of that great feudal lawyer, Lord Braxfield, as reported by Lord Hailes, in Mackenzie v. Mackenzie, for it shows his opinion of the effect of such a reservation being merely the exclusion of a condition. "May not," says his Lordship, "the superior throw in a reservation? If he does not, he cannot afterwards "claim, for the granting of the first charter is the enfranchisement "of all the subsequent disponees." The Court also, in Argyll v. Dunmore, in the interlocutor, expressly says, "In respect the "reservation proposed leaves the question entire when it shall "occur." It is quite clear, therefore, that the meaning was to leave the question entire, and no more.

It remains to take notice of the two other cases which have come into discussion. The Duke of Hamilton v. Baillie, and the Duke of Hamilton v. Hopetoun. The point arose in the first of those actions, and no doubt, as far as the decree goes, it may be said to be in the vassal's favour, the observation of the learned

Lord President especially, being in his favour. But there there had been possession for forty years under the charter, and all the three Judges who decided the case rely upon that; they take notice of that, two of them indeed resting their decision on that alone, and one of them, Lord Gillies, expressly saying that it did not decide the general question. It therefore seems reasonable to lay that case out of view, as an authority either way, in disposing of the present. But although that case may, as a decision, be laid out of view at present, we cannot overlook the great and weighty authority of Lord Corehouse in dealing with the same question. How true soever it be that the general question was not in that case of necessity raised, that most able and learned Judge, that great feudal lawyer, gave it as his clear opinion, that the composition taken by the superior for entering the first disponee enured in favour and in protection of all the subsequent heirs of the investiture, for he says that were it not so, and were each stranger in blood bound to compound over again for his entry, a tailzied fee would more profit the superior than a fee simple.

But the other case, (the case of Hamilton *v.* Baillie, being laid out of view for the reasons I have mentioned, as going upon the special circumstance of forty years' possession,) goes a great deal further for the support of the vassal's claim, and it is incumbered with no special circumstances whatever. Lord Moncrieff justly says that this case did not at all impeach that of Westshiell, Lockhart *v.* Denham, and that the present question did not arise. But I think his Lordship sets the importance of that decision too low as regards its bearing upon the present case, when he merely seeks to get rid of it as an authority against the vassal, and against the side of the question on which his Lordship is ranged. It appears to go a good deal further, and we have the valuable intimation of Lord Mackenzie, one of the learned Judges who side with the appellant and the superior here, and against the vassal, that although the present question was not there raised, yet the Court expressed an opinion, which he calls accidental,

meaning, I presume, obiter, in giving a general exposition of the law. "I cannot," his lordship says, "deny that it was their "opinion, it was the opinion of myself who wrote the judgment, "and I entertain no manner of doubt that it was the opinion also "of the other Judges who signed that judgment." But let it be borne in mind that there is on the other side nothing to set against this opinion, even if it be only an *obiter dictum* of the Court, any more than there is anything to set against Mr. Erskine's authority, be it only a statement of his adopting the principle of the Westshiell case.

But Hamilton *v.* Hopetoun, goes further still. The decision is matured on the question here raised respecting the difference between heirs connected by blood and mere strangers. The Court confined its judgment to heirs of the blood or line, because there was no question before them of any other, and any declaration going beyond that would have been obiter and unnecessary and not called for. But then they laid down, in the clearest manner, that no heir of the blood, be he a five hundredth or a five thousandth cousin, could be considered a singular successor, with a view to the question of his entry, under the investiture. Therefore, as Lord Ivory well observes, there is an end of the appellant's contention, that any heir of entail not in the direct line, is to be regarded as a singular successor, though an heir of the investiture.

In conclusion, it must be observed, that the utmost extent to which the argument goes in favour of the superior, is to shew that he has not the Westshiell case against him. Now, I never gave more attention to any case than the present, on account of the peculiar circumstances in which it comes before us, and the great feudal importance of the question. I have examined most minutely all the arguments, both at the Bar, and proceeding from the Bench, and I find that the whole of the contention resolves itself into an attempt, which I think a failing attempt, to displace the Westshiell case. But supposing that case is displaced, this

only shews that one of the authorities for the respondent is taken away from him, but it does not set up any authority against him. Now the burthen lies on the superior to prove his title against the vassal, first, because he claims, and secondly, because he is actor; and he has adduced no authority whatever in his behalf. He has to maintain a distinction between one class of heirs of investiture and another class, calling the one heirs, the other purchasers, or he has to separate singular successors into two classes, one connected by blood, the other strangers in blood. He has to introduce as to entails or tailzied successions, a new law; to make two laws for the same investiture, the one such as relates to all relations out of the direct line, however remote from the legal, that is the common law successor, even a five hundredth cousin, and the other a law applicable to strangers in blood. Those two kinds of law he has to prove, belong to the law as to heirs of investiture. In a word, he has to show that an entail savoring in all its parts of inheritance where there is blood, though it is all purchase, and in all its parts savoring of purchase, is heritable, even though it relate to a five hundredth cousin, and that where blood is out of the question, though it is under the same investiture. He has not given any such authority; all the authority is only used to shew that this is a case of the first impression; but be it such a case, the principle is all for the respondent.

My Lords, upon these grounds, which I have entered into at greater length than I should otherwise have done, on account of the peculiar importance and difficulty of the case, I am clearly of opinion that this decision ought to be affirmed.

LORD COTTENHAM.—My Lords, the very equal division of opinion which has existed in this case amongst the learned Judges of the Court of Session, upon a question of purely Scotch law, makes it a painful duty to have ultimately to decide it, but the elaborate manner in which the subject has been discussed by those learned Judges, and the learning they have brought to bear upon it, have very much relieved the case from the difficulty naturally

belonging to it. Having maturely considered those very learned opinions, I do not feel much hesitation in adopting the reasoning upon which the majority of the Judges have rested their judgment, and therefore in coming to the conclusion that the interlocutor appealed from ought to be affirmed.

Whatever might be the state of the law as between the superior and the vassal, upon entails made by the latter prior to the Act of 1685, it is certain, that under that Act the latter had the right and power of substituting heirs in his lands by tailzie; that is, of substituting persons in the succession, whether strangers in blood or not, and who were designated as heirs. The superior was bound, under this Act, to give effect to such entails; he could not refuse because strangers in blood were introduced into the succession. If, therefore, the right of the superior before the Act to require payment of a composition of one year's rent, arose from, and depended upon, his right of refusing to give effect to the proposed entail or alienation, it is obvious that the Act very materially altered his position. Certain rights of the superiors were not overlooked by the Act, for it provided that the Act should not prejudge the superiors of the casualties of superiority which might arise to them out of the tailzied estates, and that those fines and casualties should impart no contravention of the irritant clauses. The fines and casualties spoken of were obviously claims which were to arise and become payable *out* of the estate after the completion of the entail. If the composition claimed be not a casualty of superiority which was due and demandable out of the estate before the Act, it cannot be included in the reservation, and the Act would in that case be conclusive against the appellant's claim.

For the reasons stated by the Lord Justice Clerk, there seems to be much ground for holding that the composition was not a casualty of superiority, and was not payable out of the estate. If, before the passing of that Act, the superior was not bound by common law to give effect to an entail in which strangers were

included in the succession, then the composition of a year's rent, when paid, was not a casualty of superiority, but a sum agreed upon as the price of the charter; and if the superior was so bound upon payment of this composition, then this common law right will be found in the authorities antecedent to 1685.

The Statute of 1469, which allowed land to be apprized by creditors, obliged superiors to give an entry to the apprisers for payment of a year's rent, but there does not appear to be any ground for supposing that the appriser was restrained as to the disposition of the interest he took under the statute, and if he was at liberty to make the investiture in favour of such heirs as he chose, then succession of strangers in blood could not be subject to another payment of one year's rent, the statute only requiring one such payment. So, when the Courts assumed the jurisdiction of making dispositions effectual by adjudication, they did not require the vassal to pay the composition of a year's rent, that proceeding not being within the Statute of 1469, and it must be assumed that the superior was not considered as entitled to it until the Act of 1669 in terms gave him that right.

This history of the law appears plainly from the first volume of *Stair*. The Act of the 20th George II. compelling the superior to enter all disponees, on payment of the usual dues and casualties, gave no new right to the superior. From this and the other authorities referred to, it appears to me to be well established that before the Statute of 1685, all vassals had the means of changing the investiture, and of making what declarations they pleased; but as those means were under the Acts of 1469 and 1669, the superior was entitled to a composition of one year's rent, but as this was due only by virtue of those statutes, and as those statutes gave it only upon the entry of the apprisers or adjudgers, he was not entitled to it upon the succession of any one claiming under such entry. Nothing, therefore, in the nature of the claim now made was a casualty of superiority at the time of passing the Act of 1685. That statute,

therefore, in giving power to make tailzies, gave a right against the lord to give effect to that right, and as the claim in question did not exist before that time, and was not within the reservation, and certainly was not given by that Act, there cannot be any legal foundation for it.

Upon general reasoning, this would appear tolerably clear, but it must be ascertained what decisions there are affecting this question, and the answer to that inquiry strongly confirms this view of the case. The case of Denham in 1760 appears to be a decisive authority. The very point was raised and decided against the superior, although there was a reservation of the supposed right. The acknowledgment of the entail is stated in terms only to have consisted in granting the charter and infeftment thereon, which all exist in the present case. Erskine thought this decision conclusive, and I do not find any subsequent case displacing the authority of this decision. That of Mackenzie, indeed, in 1777, confirms it, and particularly the observation of Lord Braxfield, that the granting of the first charter was an enfranchisement of all the subsequent disponees. There was no question in that case of paying a second composition.

The case of the Duke of Argyll *v.* Lord Dunmore, in 1798, may show that the superior was not willing to consider the case of Denham as conclusive against his claim, but it proves no more. There was no decision, and as it was probable that the fact necessary to raise the question would never arise, the parties were willing to keep it open. But the case of the Duke of Hamilton *v.* Lord Hopetoun is of more importance, though in that case, as in the preceding, the precise question did not arise, and was therefore reserved; but in that case it was held that a purchaser was entitled to substitute all his own heirs in any order he chose, without the superior's consent, and consequently, the first in the succession being the purchaser's son and his heir male, that the superior had then no claim. Now if the vassal

is not bound to preserve the order of succession which was originally the nature of such grants, but may substitute any persons of the blood of the first taker, without reference to their order or their probability of inheriting according to the rules of inheritance, the only principle upon which the claim can be supported seems to be removed, for whether the party named be a perfect stranger, or so remotely connected in blood, and with so many before him as to make his chance of inheriting absolutely hopeless, must be perfectly indifferent to the superior. The ancient rules of inheritance by this decision do not regulate the superior's claim.

In the Duke of Hamilton *v.* Baillie, in 1827, the superior having granted the charter without any reservation, was held bound to enter, that is, he was held to be precluded by his own act from raising the question. That case, therefore, is directly in point with the present.

These cases, on the part of the respondent, are not met by any contrary decisions; I think, therefore, that upon authority, as well as upon principle, the decision of the Court below was right, and that the interlocutor appealed from ought to be affirmed.

LORD CAMPBELL.—My Lords, I was present when this case was argued, and I think that after the very ample discussion which it has undergone, it is unnecessary for me to say more than that I entirely concur in the view taken of the subject by my noble and learned friends who have preceded me. I think it is quite clear that the onus lies upon the appellant to lay down the rule; and if he has not laid down any certain rule, nobody can tell exactly what he contends for. But, at all events, he must substantiate his claim. Now, he does not substantiate it, the statute does not give him what he claims, nor is there any decision in his favour, nor any general doctrine upon which he has relied. I think therefore that he fails. I do not see that the respondent in the first instance is called upon to repel the

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claim; there is no *primâ facie* case made out on the part of the appellants. As this question is of very great importance to the law, and both my noble and learned friends have gone into it so very elaborately, I trust that what they have said will have a very salutary effect in settling the law upon the subject.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the Interlocutor therein complained of be affirmed with costs.

SPOTTISWOODE and ROBERTSON—DEANS, DUNLOP, and HOPE, Agents.

[Heard 26*th April*. Judgment, 5*th September*, 1844.]

DONALD LINDSAY, Trustee, on the sequestrated estate of the MOST NOBLE GEORGE MARQUIS OF HUNTLY, EARL OF ABOYNE, &c. &c., —*Appellant and Respondent in Cross Appeal.*

THE RIGHT HON. CHARLES EARL OF ABOYNE,—*Respondent and Appellant in Cross Appeal.*

Tailzie.—A prohibition against "burdening or affecting" lands "in "whole or in part, with debts or sums of money, infeftments of "annual-rent, or any other servitude or burden whatsoever," held to be a sufficient prohibition against the contracting of debt, to satisfy the Act 1685.

Ibid.—An irritant clause in its outset, embracing the acts done by the institute of entail, as well as by the heirs, is not limited in its operation to irritating the acts of the heirs only by these words, "and be ineffectual and unavailable against the other heirs called to "succeed," and by a subsequent declaration, that "the heirs, as well "as the said lands and estate, shall no wise be burdened therewith, "but free therefrom, in the same manner as if such debts or deeds "had never been contracted or granted, or such acts or omissions "had never been done or happened."

Ibid—A deed of entail only referring to a previous deed for its fetters, *held* to be ineffectual.

CHARLES HALLYBURTON, Earl of Aboyne, by deed bearing date the 23rd day of September, 1782, executed an entail of his land and lordship of Aboyne and others in favour of himself in liferent, and his eldest son, then George Lord Strathaven, in fee, and the heirs male descending of his body, and a series of other substitutes.

This entail contained the following among other prohibitions:—"And with and under this restriction and limitation "also, as it is hereby expressly conditioned and provided that it

" shall not be in the power of the said George Lord Strathaven " my son, nor of any of the other heirs succeeding to the said " lands and estate hereby resigned, to sell, alienate, wadset, " impignorate, or dispone the same, or any part thereof, either " irredeemably or under reversion, or to burden or affect the " same in whole or in part with debts or sums of money, " infeftments of anuual rent, or any other servitude or burden " whatever."

After giving the heirs power to make provisions for their wives and children, and limiting the way in which this should be done, the entail continued, " And with and under this " restriction and limitation also, that the said George Lord " Strathaven my son, and all the other heirs succeeding to the " said lands and estate, are and shall be hereby limited and " restrained from doing any act, and granting any deed directly " or indirectly, whereby the lands and estate before disponed, or " any part thereof, may be affected, apprysed, adjudged, forfeited, " confiscated, or be any manner of way evicted from the said " George Lord Strathaven, or any other of the said heirs, or this " taillie or nomination, or other writ to be granted by me or " the order of succession there or hereby established, be pre- " judged, hurt, or changed, excepting as in the cases before " excepted."

The prohibitions of this entail were fenced by the following clauses:—" And with and under this restriction and limitation " also, as it is hereby expressly conditioned and provided, that " the lands and estate before disponed shall not be affected or " burdened with, or be subjected or liable to be adjudged, " apprysed, or any other way evicted, either in whole or in part, " for or by the deeds or debts legal or voluntary contracted or " granted by the said George Lord Strathaven, or any of the " heirs succeeding thereto, whether before or after their succes- " sion to, or attaining possession of the said lands and estate, " or with, for, or by the omissions, acts, or deeds committed or

" done by them, or any of them, prior or posterior to their suc-
" cession. And with and under these irritances following, as it
" is hereby expressly conditioned and provided, that in case any
" adjudication, apprysing, or other legal diligence and execution
" shall happen to be obtained of or used against the fee or pro-
" perty of the lands and estate before disponed, or any part
" thereof, for not-payment or performance of any debt or deed
" payable or prestable by me or my ancestors whom I repre-
" sent, or of any real, legal, or public burden or other claim
" or demand to which the said lands and estate, or any part
" thereof, are now or may hereafter happen by law to be sub-
" jected or made liable, then and in that case the said George
" Lord Strathaven, or any other heir in possession of the said
" lands and estate for the time, shall be bound and obliged
" to redeem or otherwise purge such adjudications, apprysings,
" or other legal diligence within three years if he be within
" Scotland, and if he shall be forth thereof, within four years at
" most, after the same shall happen to be led and deduced, and
" final decreet therein pronounced. And in case of his or her
" failure to redeem and purge the same accordingly, then he or
" she, though dying or becoming legally disabled to hold and
" enjoy the said lands and estate within the space of three or
" four years, shall forfeit and lose his or her right and title to the
" lands and estate hereby disponed, and the same and right of
" redemption thereof, shall fall and devolve to the next heir
" capable to take and hold the same, who would succeed thereto
" upon the natural death of the person so failing, and such next
" heir called to the succession through the failure, death, or
" disability of the former heir, and also failing, such next heir,
" by death, or becoming legally disabled to take and hold the
" said estate, all the other heirs capable and called to succeed,
" through the death or disability of the former heir, within the
" space of five or six years at most after the obtaining such adju-
" dication or other legal diligence or execution as aforesaid,

" shall severally in their order be holden and obliged to declare " the irritancy of the former contraveener or failer's right, and " to redeem or purge the said diligences within the space of six " years at most, wherein if they also fail, they shall in like " manner forfeit and lose all right and title to the lands and " estate hereby disponed, and the same and right of redemption " thereof shall fall and devolve to any of the subsequent heirs " called after these so failing, whether nearer or remoter, who " shall think fit to redeem the said lands and estates, and purge " the said diligences before the expiry of the legal reversion " thereof, and the heir so redeeming and purging as said is shall " have the sole right and title to the said lands and estate, ex- " clusive of all the prior heirs who failed so to redeem. But " provided always that, in case any two or more of the subse- " quent heirs be ready and willing to redeem and purge as said " is, the nearer heir shall always be preferred to the right and " benefit of such redemption before the remoter heir, though " equally ready and willing to redeem. And provided also, that " the heirs so redeeming, and all the heirs succeeding to them, " shall be liable to the same conditions, restrictions, and irri- " tancies to which the heirs contraveening or failing were liable. " And with and under this irritancy, as it is hereby conditioned " and provided, that in case the said George Lord Strathaven " my son, or any of the other heir succeeding to the lands and " estate before disponed, shall contraveen the before-written con- " ditions, provisions, restrictions, and limitations herein con- " tained, or any of them, that is, shall fail or neglect to obey or " perform the said other conditions and provisions, and each of " them, or shall act contrary to the said other restrictions and " limitations, or any of them, or shall contraveen any other con- " ditions and restrictions to be hereafter added and appointed by " me, excepting as is before excepted; that then, and in any of " these cases, the person or persons so contraveening shall for " him or herself only *ipso facto* amitt, lose, and forfeit all right,

" title, and interest which he or she hath to the lands and estate " before disponed, and as such right shall become void and " extinct, so the said lands and estate should devolve and accrese " and belong to the next heir appointed to succeed, albeit " descended of the contraveener's own body in the same manner " as if the contraveener were naturally dead, and had died before " the contravention. And upon every contravention which may " happen by and through the said Lord George Strathaven my " son, or any of the other heirs succeeding to the said lands and " estate, their failing to perform all and each of the conditions, " or acting contrary to all or any of the restrictions before " written; it is hereby expressly provided and declared, not " only that the lands and estate before disponed shall not be " burdened with or liable to the debts, deeds, or acts of the said " Lord George Strathaven, or any other of the heirs contraveen- " ing, as is already herein provided, but also all debts con- " tracted, deeds granted, and facts done contrary to the condi- " tions and restrictions appointed by me, or to the true intent " and meaning hereof, shall be of no force, strength, or effect, " and be ineffectual and unavailable against the other heirs " called to succeed, and who, as well as the said lands and " estate, shall nowise be burdened therewith, but free therefrom " in the same manner as if such debts or deeds had never been " contracted or granted, or such acts or omissions had never been " done or happened. And also it is hereby provided and de- " clared that it shall be free and lawful to every heir who shall " have a title by and through any contravention or the inca- " pacity of the former heir, and though a minor at the time, to " sue and obtain declarator of his own right, and of the irritancy " of the former heir's right, or to serve heir of the person who " died last vest and seized in the lands and estate before dis- " poned preceding the heir becoming incapable or contraveening, " and thereby, or by adjudication, or any other formal or legal " way or method, to establish in his or her person the right and

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" title of, and to the said lands and estate, and that without " being subjected to, or liable for the deeds or debts of the person " or persons becoming incapable or contravening, and without " regard to their neglects or omissions, or any alteration made " or intended, or acts done by them contrary to the conditions " and restrictions appointed by me."

On the 30th of November, 1785, the Earl of Aboyne executed an entail of his lands of Drumniachie in favour of the same series of heirs as in the entail of 1783, by a deed which bore special reference to that entail by recital of its date and contents. This deed of 1785 did not contain any express fetters further than by the following Clause: "But with and under " the conditions, provisions, restrictions, limitations, exceptions, " clauses irritant and resolutive, and declarations specified in the " said deed of entail, and likewise herein referred to and held as " repeated *brevitatis causâ*, but which are appointed to be in- " grossed in the charters and infeftments to follow thereupon, " and on these presents."

The maker of these deeds died, and was succeeded in his estates by his eldest son, the institute in the deeds, who afterwards became George Marquis of Huntly and Earl of Aboyne. The estates of the Marquis of Huntly were sequestrated by the Court of Session for payment of his debts, and the appellant was appointed trustee under the sequestration. In that character he brought an action against the Marquis of Huntly and the substitutes of entail, concluding that it should be found "that " the said deed of entail, dated 23rd September, 1782, is not " entitled to the protection of the Act of Parliament anent " tailzies, and therefore that the said lands and lordship of " Aboyne, and others, are liable for the debts of the defender, " the said George Marquis of Huntly, and are liable to be " attached by the diligence of his creditors; and in particular " that, notwithstanding the provisions and declarations, prohi- " bitions, limitations, and restrictions, and clauses irritant and

" resolutive, of the said deed of entail, the said lands and others " are liable for the debts due to the creditors of the said Marquis, " and consequently, the said lands and others are legally, validly, " and effectually adjudged from the defender and the subsequent " heirs of entail above mentioned, in virtue of the decree of adju- " dication pronounced in favour of the pursuer as trustee afore- " said, for payment and satisfaction of the debts due by the said " Marquis: and it ought and should be found and declared that " the pursuer has a good and sufficient right to grant leases of " the said lands and others before mentioned, for the space of " two nineteen years, or for nineteen years and the lifetime of " the tenant in possession at the expiry of the said nineteen " years, according to the powers contained in the said deed of " entail: and *separatim*, it ought to be found and declared, by " decree foresaid, that the supplementary deed of entail, dated " 30th November, 1785, is invalid and ineffectual, and does not " protect the lands of Drumniachie, and others therein men- " tioned, or the advocation and donation and right of patronage " of the united parishes of Glenmuick and Glengarden, from " being affected by the debts and deeds of the said Marquis of " Huntly, and that they are liable therefore and are adjudged, " by decree foresaid, to pertain and belong to the pursuer, as " trustee foresaid, for payment and satisfaction of the debts due " by the said George Marquis of Huntly."

The pleas which the appellant maintained in support of this action were as follow:

" 1. The prohibitory clause contained in the deeds of entail " executed by Charles Earl of Aboyne, in the years 1782 and " 1785, do not contain the substantive prohibitions required by " the Act 1685; and in particular, they do not contain a pro- " hibition in terms of that Act against the contraction, nor do " they prohibit the contraction of debt, which may be made " good and effectual against the tailzied lands and estate by " process of law.

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" 2. The deeds of entail libelled on do not contain a declaration in conformity with the Statute 1685, that all debts contracted, deeds granted, or facts done by the institute or heirs of entail, in opposition to, or in contravention of, the prohibitions contained in the deed of entail, shall be in themselves null and void.

" 3. The irritant and resolutive clauses contained in the deed of entail do not apply to the prohibitions, and therefore the prohibitory clauses are not fenced, in terms of the Act 1685, by the requisite irritant and resolutive clauses; and consequently, as the deed is not framed in terms of the Act 1685, the heirs of entail are not entitled to plead the terms of that statute or prevent the estate from being adjudged by the trustee.

" 4. The resolutive clause in the deed of entail declares, that if Lord Strathaven or the heirs of entail should contravene the prohibitions, then he should *ipso facto* lose the title to the estate; but this resolutive clause does not apply to any act done by the creditors for the purpose of adjudication, as that act is not done by the institute or heirs in possession, and the penalty cannot apply to the acts of third parties.

" 5. The irritant and resolutive clauses in the deed of entail libelled upon cannot prevent the adjudication of lands in payment of debt, although they are contained in the deed of entail, if there is not a substantive prohibition against the contraction of debt, because the diligence of the law cannot be excluded if the prohibition do not reach the personal contractions of the heir.

" 6. There being no prohibition against the contraction of debt, and the irritant and resolutive clauses being only directed against and applied to acts done by the Marquis, or to things done in consequence of acts of the Marquis, which are prohibited, or to a failure on his part to obey an obligation or injunction imposed on him, neither the irritant nor resolutive

" clauses can have any effect or operation in the case of adjudi-
" cation or other diligence being used against the estate upon
" debts contracted by the Marquis, there being in such proceed-
" ing no direct act or interference on the part of the Marquis,
" nor any thing following upon any act of the Marquis which is
" prohibited, nor any failure on the part of the Marquis to obey
" any obligation or injunction imposed on him by the entail; or,
" at all events, the irritant clause does not apply to the case
" supposed.

" 7. The entail is not valid and effectual, because, while it
" purports to resolve the right of the contravening heir, and
" declares that the next heir shall be entitled to complete his
" right to the estate, without respect to the acts of the contra-
" vener, it omits, in a special enumeration of such acts, all refe-
" rence to deeds of sale and alienation.

" 8. The entail is not valid and effectual, in respect that the
" provision for enabling any of the heirs-substitute, in the event
" of a contravention of the entail, to sue and obtain declarator
" of his own right, and the irritancy of the contravener's right
" only applies to cases of contravention by an heir of entail, and
" not to the case of contravention by the institute, so that, in
" terms of the said provision, it is not in the power of an heir-
" substitute to pursue a declarator of his own right, or irritancy
" of the Marquis of Huntly's right, in the case of a contravention
" by him, he being the institute, and not an heir of entail; and
" consequently the entail contains no irritancy or resolution of
" the Marquis of Huntly's right to the estate, which can be
" made effectual against him, which is essential to the validity
" of the irritancies in the entail as regards him, and hence also
" essential to the validity of the entail itself.

" 9. The Marquis of Huntly, the institute under the entail,
" is not precluded from letting leases for any period, or in any
" way, for or in which a fee-simple proprietor may grant leases
" according to law.

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"10. The lands contained in the supplementary deed of "entail executed in 1785, are not entailed, because no entail "can, in a question with third parties, be made by a mere deed "of reference to a previous deed of entail."

The respondent, the eldest son of the Marquis of Huntly, on the other hand, pleaded as follows:—

"1. The action has been incompetently raised, or at least "cannot now be insisted on, being barred by the provisions and "enactments of the Sequestration Act.

"2. The action is groundless in itself, in respect the deed or "deeds of entail libelled, are in every respect formal and com- "plete, both under the Act 1685, and otherwise; and in parti- "cular, said deed or deeds, by sound construction, effectually "prohibit the contracting of debt, and protect the estate from "all claim or diligence at the instance of the creditors of the "Marquis of Huntly."

The questions raised were argued in elaborate cases. Upon considering these papers the Lord Ordinary (Jeffrey) made avizandum with the cause to the Inner House, accompanying his interlocutor by a note in these terms.

"*Note.*—The Lord Ordinary reports this case without a "judgment, that it may be decided with the least possible "delay: there are points of nicety in it, but, on the whole, he is "inclined to sustain the defences.

"Upon the leading question, as to the sufficiency of the "prohibition against *debts*, he sees no reason for departing from "the authority of the cases of Gala, in 1722, Sheuchan, in 1820, "and Newhall and Cappledrae, both in 1823; and he cannot "consider these cases as at all discredited by the later judgment "in the case of Carleton, in 1830; both because there is no "mention whatever of *debts* in the leading clauses of that entail; "—but a prohibition merely against 'burdening with *infeftments* "'*of annual rent, or any other servitude or burden*,'—and because "there was, in fact, no decision, or room indeed for deciding—

" whether even these words might not amount to an effectual " prohibition of debts; inasmuch as the case was disposed of on " the ground that there had, in reality, been no debt contracted, " and that it was consequently unnecessary to determine what " would have been the effect if there had. In any question upon " the construction of so succinct and imperfectly expressed a " statute as that of 1685, it would be most hazardous to disturb " or depart from such a series of decisions; but if the question " were open, the Lord Ordinary conceives that effect would now " be given to the views on which these judgments proceeded. " The very basis of the pursuer's argument appears to him to be " unsound. He necessarily assumes that it was really intended " by the statute to prohibit the contraction of *personal debt;* that " in strictness of law, every heir who signs a bill or personal " bond, or who owes an account to his tailor, has truly incurred " an irritancy; and that there is nothing but the *want of in-* " *terest* in the succeeding heirs that prevents it from being " enforced. Now, the succeeding heirs have as little interest in " one-half of the irritancies which occur in some entails, as in " this of contracting personal debt. But take the most usual " and common provisions of irritancy, as by not taking the name " and arms, or forfeiting on succeeding to a peerage, or to " another estate: what possible interest have the succeeding " heirs in the enforcement of these, or of more capricious condi- " tions, which do not in the least affect the integrity or value of " the estate, or in any way shake the security of its descent " through the whole course of the destination? Yet all these " are enforced daily, and are indeed among the most common " cases of actual forfeiture. The decisions, therefore, which " have settled that no irritancy is incurred by the mere con- " traction of personal debt, *could not* not have proceeded on the " ground of want of interest to enforce it; there being always " the solid and sufficient interest to bring the succession nearer to " the substitutes who might challenge. And it is plain, indeed,

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" both from the reason of the thing and the reports, that they " did proceed upon the more fundamental ground, *that it was* " *not the true meaning of the statute* to prohibit such contractions, " but only their being allowed to affect or become burdens on the " estate. They are truly decisions, therefore, not on the import " of clauses in the deeds under consideration, but *on the construc-* " *tion of the act;* and to the Lord Ordinary they appear most " sound decisions. The Act itself does not, even in terms, pro- " hibit the contraction of debt *generally or absolutely;* but only " the contraction of debt, ' whereby the lands may be adjudged, " ' apprised, or evicted:' *may* obviously meaning *shall actually* " *be* (or rather be attempted to be) so adjudged or affected; since, " on any other view, these most important words would have no " meaning or effect whatever; *all* lawful debts being *capable* of " being made the means of attaching the property. The very best " and most accurate *formula* therefore, for following out this pro- " vision of the statute, would seem to be that adopted (and found " sufficient), in the case of M'Kenzie (Newhall), of a prohibition " ' to contract debts *on the property,*' which in the succeeding " case of Cappledrae was justly thought to be synonymous with " ' burdening the property with debts.'

" It is to be observed, too, that if these be substantially deci- " sions on the true import and meaning of the statute, the prin- " ciple of *strict construction* (so much pressed by the pursuer), is " quite as applicable to a statute limiting the rights of property, " as to any private instrument executed under its authority, and " is *wholly against* the interpretation for which he now contends, " —it being plainly a far greater infringement of common law " rights, and far more penal and odious in itself, to subject a " proprietor to forfeiture merely for contracting *personal* debts, " than to reserve that penalty for making them burdens on a " privileged or protected property.

" These views are probably sufficient for the decision of the " present question. But the Lord Ordinary has a strong im-

"session that the reasoning of the pursuer rests on a still more "fundamental fallacy. What he chiefly relies on is an alleged "defect in the *prohibitory* clause; and, pretty nearly admit-"ting that the irritant and resolutive clauses are sufficient, he "puts the case distinctly on the proposition that a prohibitory "clause is essential: and that no form of expression in "the other operative clauses can supply its want or imper-"fection. Now, the Lord Ordinary demurs to the whole "of this doctrine. The statute requires no prohibitory clause, "and makes no mention of any such clause; and accordingly the "Lord Ordinary cannot now bring to his recollection that he "has ever seen an entail in which words of proper *prohibition* or "interdiction occur. The most common form of the introduc-"tory enumeration of the things to be irritated is, that 'it shall "'not be lawful' to the institute and heirs to do so and so; or, "*as happens to be the case in the present instance*, that 'it shall "'not be in the power' of the said parties (see printed deed, p. "9, C) to do so and so. But these, it is thought, are in sub-"stance *not prohibitory*, but general and preparatory *irritant* "clauses. That 'it shall not be lawful' to do certain acts, means "only that these acts *shall not be effectual in law;* and that the "'heirs shall not have power' to do them, can import nothing "else (since the physical or *actual power* undoubtedly remains), "but that they shall not do them *with effect;* or, in other words, "that they shall be null, in respect of the declaration of irritancy, "to which this statement is but introductory. The Lord Ordi-"nary's notion, in short, is, that the clauses called prohibitory "are truly in all cases but preambles to the only really operative "clauses, the irritant and resolutive; and preambles, too, which "might be very safely omitted. For he is of opinion further, "that there is no need, either under the statute or in the nature "of the thing, for any such introductory specification; and that "a perfectly valid entail might be made by proper irritant and "resolutive clauses alone, without anything in the nature of that

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" previous enumeration, which the pursuer calls prohibitory, and " maintains to be essential. If the maker of such a deed, for " example, immediately after disponing the lands to a certain " series of persons, under the conditions, provisions, and limita- " tions after written, were merely to proceed in some such words " as these: 'That is to say, that if any of the said persons shall " 'sell, alienate, or dispone the said lands, or shall burden or " 'allow them to be burdened with debt, or shall alter the order " 'of succession, &c., then, not only shall all such acts and deeds " 'be null and of no effect against the said lands, but every " 'person so acting shall forfeit all right thereto,' &c.; would " not *this* be altogether as good and effectual a deed, as if these " irritant and resolutive clauses had been introduced by a decla- " ration that it should not be lawful to (or in the power of) the " the said persons to sell, burden with debt, or alter the order of " succession? Now, even assuming that the introductory pro- " vision in the present case, that it shall not be in the power of " the institute or heirs to burden the lands with debt, would not " be sufficient to protect them from adjudication at the instance " of creditors, the Lord Ordinary thinks there is enough in the " irritant clauses which ensue to effect this purpose.

" First of all, however, there is a distinct obligation laid on " the heirs to purge, within three years of their date, *any adju-* " *dications* which may be deduced, not merely for debts or obli- " gations of the entailer himself, or his ancestors (though these " are first mentioned), but 'for any legal or public burden, *or* " '*any claim or demand* to which the said lands, or any part " 'thereof, may hereafter happen *to be subjected or made liable.*' " Now, if this is to be read as supplementary to, or exegetic of, " the previous provision that there should be no power to burden " with debt, it would seem to leave no doubt as to the fact that " burdening, and *allowing to be burdened*, were expressly placed " and brought under the same category by the entailer.

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"But at all events there is a distinct and *independent* "clause, providing 'that the lands above disponed shall not "be affected or burdened with, or be liable to be adjudged, "apprised, or evicted (in whole or in part) for or by the debts "or deeds, whether legal or voluntary, of the said George (the "institute) or any of the heirs succeeding, or by any omissions "or acts committed or done by them, either prior or posterior "to their succession.' Now, the Lord Ordinary considers this "as a proper and specific, *or special irritant clause*, importing in "direct terms that all such debts and deeds shall be null, and of "no effect in regard to the said property. And, as it bears no "reference to any previous prohibition or declaration of want of "power, he does not see why it should not be admitted to its "full effect, exactly as if there had been in the deed no such "previous declaration: and then the only question as to the "complete validity of the provision must depend upon its being "sufficiently covered by the terms of the *resolutive* clause. That "clause, however, which immediately follows the two which "have been last referred to, is of the most general and com-"prehensive description, and purports, 'That if any of the "'persons so called to the succession shall contravene *any* "'*of the said provisions or limitations*, or shall *fail or neglect to* "'*obey or perform the whole said conditions and provisions, or* "'*any of them*,' they shall omit, lose, and forfeit all right to the "lands, &c. Now, as it cannot be disputed that both the in-"junction to purge all adjudications, and the provision that no "debts or deeds of the heirs should be allowed to affect or burden "the lands, are among 'the provisions, conditions, and limita-"'tions' of the deed, it seems necessarily to follow that any heir "who should allow the lands to be affected or adjudged for his "debts or deeds must be held to have 'failed or neglected to "'perform the whole of the said conditions and provisions;' "and consequently to have incurred the full penalties of the "resolutive clause.

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" The whole is wound up by an anxious and comprehensive " iteration of the irritant clause; declaring, 'not only that the " 'lands shall not be burdened or affected by the debts or deeds " 'of the said George (the institute), as the heir succeeding, *as* " '*is already provided*, but that all debts contracted, deeds " 'granted, and facts done, contrary (not to any previous *pro-* " '*hibitions*, but generally), to *the conditions or provisions ap-* " '*pointed by me*, or the true meaning thereof, shall be *of no* " '*force, strength, or effect, and ineffectual and unavailable* " '*against the other heirs and the estate*, which shall nowise be " 'burdened therewith, but free therefrom, as if such debts or " 'deeds had never been contracted or granted, or any such acts " 'or omissions had never been done or happened.' The cavil " of the pursuer as to the want of the words 'null and void,' " in this most elaborate irritant clause, seems entitled to no " consideration, any more than that as to the introduction of " the word 'other' in the preamble to the resolutive clause, " which manifestly refers and can only refer to the immediately " preceding provision about purging adjudications; and cannot " possibly refer merely to future contemplated provisions; inas- " much as the leading words are '*the said other* provisions and " 'restrictions, or any of them;' after which it is added, as a " separate and alternative provision, 'or any other conditions and " 'restrictions to be hereafter added and appointed by me.' The " defender's answer to the seventh and eighth pleas of the pur- " suer is also satisfactory to the Lord Ordinary. He is inclined " to hold, however, that the limitation of the power of *leasing* is " not so expressed as to affect the institute; but the plea upon " this point seems not to be within the libel, and indeed, to be " inconsistent with the only conclusion in the summons with " regard to it.

" With regard to the supplementary entail of Drumniachie, " the Lord Ordinary is satisfied, on the whole, with the autho- " rities and explanations of the actual state of the titles furnished

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"or referred to by the defender. He thinks it material, however, "to observe, that the only decision which is reported in the case "of Bromfield (or Paterson of Eccles), mainly relied on by the "pursuer, as of June 1784, was not in fact the ultimate decision "in that cause, having been recalled by the House of Lords, "when the case, in consequence of an appeal against that deci-"sion, was remitted for the consideration of this Court; upon "which remit appearance was for the first time made for the "heirs who had been omitted in the second entail, and the "ultimate judgment of the Court against its validity was then "(March 1786) specially rested on the ground of that omission; "the ultimate finding being 'that in respect of the alterations in "'the last deed, *and in particular that certain heirs called in the* "'*entail of* 1748 *are omitted in the disposition of* 1758, the said "'disposition is to be held as a new settlement of the estate, and "'*not being insert in the register of tailzies*, is not effectual "'against creditors.' The present Lord Ordinary had occasion "to consider the particulars of that case in deciding that of "Turnbull and Hay Newton, in June 1836; and his account of "it will be found in a note to p. 1033, &c. of the 14th volume "of Mr. Shaw's *Reports*. Not having again looked back to the "Appeal Cases, he cannot say positively whether the separate "finding in the first judgment of June 1784, on which the pursuer "relies (as to the limitations of the one deed being only referred "to in the other), was repeated in the ultimate judgment of "1786, which was affirmed *simpliciter* upon a second appeal. "But his impression is that it was not. The parties, however, "can easily satisfy themselves as to this (if thought material) "before the case comes on for judgment."

The Inner House (*First Division*) allowed the parties further argument in printed Minutes, and directed the pleadings to be laid before the other Judges for their opinions. That opinion was unanimous as to eight of the Judges (the Lord Ordinary adhered to the opinion in his note), and was in the following terms:—

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" I. The first question raised in this case by the record and " the revised cases is, whether there is a sufficient prohibition in " the original entail of 1782 against the contraction of debts?

" I do not entertain the least doubt, that a direct prohibition " to this effect is indispensable to the validity of every entail, in " so far as debts may be contracted to third parties by which the " estate may be affected. Every one understands what is meant " by the prohibitory clause. It is the clause, which in direct " terms prohibits, or declares it not to be lawful for, the " heirs to alter the order of succession, to sell or alienate the " estate, or to contract debts. It is so described by Mr. Erskine, " B. iii. tit. 8, § 23; and I have always understood it to be " settled law (as it has been expressed in emphatic words), that " the prohibitory clause is the key-stone of the entail. All the " cases of Argaty, Roxburgh, Lochbuy, Eastfield, &c. entirely " depended on this assumption, and on the question, whether " there was or was not a substantive prohibition against altering " the order of succession in that which all the lawyers held " to be the prohibitory clause; and the same has been the basis " of innumerable questions on the sufficiency of the words to " constitute *prohibitions* against *sales*, against *leases*, against *con-* " *tracting debts*, &c. I could not, therefore, assent to some of " the propositions in the Lord Ordinary's note in the present " cause, if I rightly understand them. I could not hold, either " that the usual clause which has been so denominated is not a " prohibitory clause, or that, without such a clause applying to " the three distinct classes of deeds, any entail would be effectual " to its purpose. More particularly, I could not think, that a " deed containing merely irritant and resolutive clauses could be " effectual as an entail under the Act 1685, if there was no pro- " hibitory clause, to which the forfeitures and irritancies declared " could be applied. The example of such a thing suggested " hypothetically would not, in my humble apprehension, consti- " tute a valid entail.

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"In expressing my opinion, therefore, in the present case, "I assume the necessity of a prohibitory clause, applying specifically to the case of debts contracted. But, when this is "granted, I am of opinion, that there is a sufficient prohibition "against debts in the entail now before the Court.

"If this question had occurred for the first time, I might "have thought it to be attended with great doubt. But, as the "matter stands, I think that the point is ruled by decisions to "which I see no answer: and being of opinion, that there has "been no change of the law since those decisions were pronounced, I cannot discover any ground on which the Court can "now depart from them. The material words in this entail are, "that it shall not be in the power of the heirs to sell, alienate, "&c., 'or to *burden or affect* the same in whole or in part *with* "'*debts or sums of money*, infeftments of annual rent, or any "'other servitude or burden whatever.' Now, in the case of "Haggart v. Vans Agnew, December 19, 1820, the words were, "'or to *burden the same in whole or in part with debts, sums of* "'*money*, infeftments of annual rent, or any other security or "'burden whatever.' It is evident that the words in the two "cases are the very same. But, in the case of Agnew, the "Court were clearly and unanimously of opinion, 'that the "'clause in question was quite effectual to free the estate from "'the claims of Robert Vans Agnew's creditors.' It does not "appear that any appeal was taken against that judgment: and "it is impossible to deny that it is directly in point to the "present question.

"The case of Mackenzie, May 23, 1823, was not exactly "the same, the words being 'or to contract debts *thereon*, or "'grant infeftments of annual rent,' &c. But it was held to "stand on the same principle; and the Court adhered to the "Lord Ordinary's interlocutor, which found that 'the deed of "'entail libelled is sufficient to protect the estate against being "'affected, burdened, or adjudged by the debts in question.'

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" But the subsequent case of Nisbett against Sir David Mon-
" crieff, &c., June 10, 1823, is again identical with the present
" case, the words of prohibition being, '*nor to burden the same in*
" '*whole or in part with debts or sums of money*,' &c., whereby
" the lands might be affected or adjudged—which the Court
" found to be sufficient to prevent the estate from being attached
" for a personal debt.

" The ground of doubt in these cases was, that, as there was
" not a direct prohibition against *contracting debts* simply, as the
" Act 1685 might be thought to point out, but only a prohi-
" bition to *burden the estate* with debt, it might be held that the
" clause was not direct or explicit against the *contraction of per-*
" *sonal debts* on which adjudication might follow. But the
" answer was thought satisfactory, that the object being only to
" protect the estate and the heirs of tailzie against being bur-
" dened with the debts of any heir, the words were sufficient for
" that purpose. The argument of the pursuer in the present
" case, however ably conducted, is the very same which was
" employed unsuccessfully in those cases. And, the point having
" been thus deliberately discussed and determined in two if not
" in three cases, I think it impossible for the Court now to
" depart from the law so laid down.

" The pursuer refers to the interlocutor of the Lord Ordinary
" in the case of Cathcart, February 12, 1830. That is in reality
" no judgment; because, although the Court adhered to the
" interlocutor in the material part of it, they expressly recalled
" the findings on which the pursuer founds, and refused to pro-
" nounce any judgment on the question whether there was a
" sufficient prohibition against debts or not. But, in reality, the
" words of the clause in that case were essentially different from
" those which occur in the present entail, or which occurred in
" those of Sheuchan, Newhall, or Moncrieff. For there was
" nothing there but general words, added to the prohibition
" against alienation, 'nor yet to wadset or burden with *infeft-*

" ' *ment of annual rent nor any other servitude or burden.*' These " words are quite general. They occur in almost every entail, " quite distinct from the prohibition to contract debt. They " are in the present entail; and similar words were in the entail " of Sheuchan. But the question here does not depend on any " such vague words. The terms relied upon as a prohibition, as " they were relied upon in Sheuchan and Moncrieff, are 'or to " ' *burden or affect* the same in whole or in part *with debts or* " ' *sums of money.*' This is a very different clause from the more " general terms which occurred in the entail of Carleton. And, " after all, there was no judgment on the effect of it. Whatever " I may have thought on that point, I hold the case now before " the Court to be essentially different, and to be ruled by the " positive decisions in the other cases.

" II. The second question is, whether, assuming that there is " sufficient prohibition against debts, the resolutive clause is so " expressed as to be effectual to protect the estate against credi- " tors. I am of opinion that it is sufficient.

" The pursuer's argument against the efficacy of the resolutive " clause really comes to a very narrow point. The maker of the " entail has in some degree perplexed his deed by the anxious " introduction of injunctions on the heir to purge the estate of all " adjudications, which might be led for entailer's debts, or for " legal burdens affecting the lands, and a very special and minute " resolutive clause directed against any failure in that point. It " is after that long and particular clause that the general resolu- " tive and irritant clauses, in plain terms directed to the fortifica- " tion of the general prohibitory clause, are introduced. That " this is the nature of them, is manifest from the introductory " words: 'And with and under this irritancy, as it is hereby " ' conditioned and provided, that in case the said George Lord " ' Strathaven, my son, or any of the other heirs succeeding to " ' the lands and estate before disponed, *shall contravene the* " ' *before written conditions, provisions, restrictions, and limita-*

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" '*tions*, HEREIN CONTAINED, *or any of them*.' It seems to be " granted by the pursuer, and is too clear for argument, that these " words are sufficient to cover the whole prohibitions, and that if " the clause had gone on directly to the operative part of it, with- " out further explanation, there could have been no doubt of its " sufficiency. But he maintains, that the words which follow are " to be taken as explanatory, and that they limit the forfeiture " declared, in some way which cannot be defined, and really is " not easily understood. If, indeed, the clause had gone on to a " special enumeration of particulars, and in that enumeration had " omitted any of the essential cases, such as sales or the contrac- " tion of debts, there would be very good ground for maintaining, " that the general words were to be taken as qualified by the " special definition, and that the clause could not apply to the " omitted case. But in this entail there is no such thing. The " object of the explanatory words is merely, to distinguish be- " tween acts of *omission* or *disobedience* of things enjoined, and " *positive* acts in *violation* of *direct prohibitions;* and it is only by " laying hold of a single word, the meaning and effect of which " are perfectly clear, that any appearance of difficulty can be " raised. The words are, 'That is, shall *fail* or *neglect to obey* or " '*perform* the SAID *other* conditions and provisions and each of " ' them, or shall *act contrary* to the said *other restrictions* and " '*limitations*, or any of them.' Some words are added, which " seem to me to be immaterial,—' or shall contravene any other " ' conditions or restrictions *to be hereafter added* and appointed " ' by me.' Whatever may be the effect of these last words, " they can have no influence to hurt the efficacy of the preceding " words. And, laying them aside, the clause goes on,—' that " ' then, and *in any of these cases*,' the person contravening shall " forfeit all right to the estate, in the most ample terms. Now " there is really nothing to be said against this clause, as import- " ing any limitation of the general words in the beginning of the " sentence, but that the word *other* has been introduced into it.

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" But it is very evident to me, that that word, though unneces-
" sary, rather tends to give precision and definite application to
" the clause, as relating to the various limitations expressed in
" the general prohibitory clause. The object and the effect of the
" word are, to disconnect the clause from the special matters to
" which the immediately preceding particular resolutive clause
" relates. It tends to prevent that very ambiguity which has
" occurred in other cases, by which a clause of this nature has
" been held or maintained to be restricted to the sort of acts or
" deeds against which the immediately preceding clauses were
" directed. But, if any doubt could exist about this matter, it
" would be removed by the words immediately following, which
" are introductory to the irritant clause; that upon any *contra-*
" *vention* ' by and through the said George Lord Strathaven,' &c.,
" ' or any of the heirs, *their* FAILING TO PERFORM *all and each of the*
" ' *conditions, or* ACTING CONTRARY *to all or any of the restrictions*
" ' BEFORE WRITTEN.' These are plain words, and they define pre-
" cisely what the contravention is, which is expressed in the
" preceding resolutive or forfeiting clause.

" I cannot, therefore, see any reasonable ground for doubt that
" the resolutive clause is sufficient.

" III. A separate objection is taken to the *irritant* clause,
" viz., that it does not bear in so many words, that the acts or
" deeds done in contravention shall be *null and void.*

" There is no doubt that these words constitute the most
" common form, and certainly the best style, of an irritant
" clause. They are used in the statute perhaps descriptively.
" But as it is quite settled that the statute does not prescribe
" any precise form of any of the clauses, the question must
" always be, whether the terms actually employed in any parti-
" cular entail are sufficient to express clearly the thing contem-
" plated in such a clause. Now, the provision here is, that on
" every contravention, as above quoted, not only the estate ' shall
" ' not be burdened with or liable to the debts, deeds, or acts of

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" ' the said George,' &c., ' but also all *debts contracted, deeds*
" ' *granted, and facts done, contrary to the conditions and restric-*
" ' *tions appointed by me, or to the true intent and meaning*
" ' *hereof*, shall be *of* NO FORCE, STRENGTH, NOR EFFECT,' &c. The
" clause goes on with other words amplifying the provision,
" ' and be ineffectual and unavailable against the other heirs,'
" &c. who ' as well as the estate shall be free therefrom, *in the*
" ' *same manner as if such debts or deeds had never been con-*
" ' *tracted or granted, or such acts or omissions had never been done*
" ' *or happened.*'

" Thinking that there is nothing in the connection of this
" clause which can at all limit its operation to anything less than
" the infringement of any of the general limitations of the entail,
" and that the words are sufficient to cover any such contraven-
" tion, I am of opinion that the words, ' shall be of *no force,*
" ' *strength, nor effect,*' must be considered as equivalent to the
" declaration of nullity contemplated by the statute and in the
" principle of such a clause. It is certainly true, that in very
" many entails the same words occur in connection with the
" words ' shall be null and void.' But, as it is in the nature of
" such deeds that many terms having the same legal effect may
" be employed, the question still is, what is the legal import of
" the words actually employed; and, as the meaning of such a
" declaration of nullity can never be to make an absolute nullity
" of onerous transactions, but only to render the deeds of *no legal*
" *force or effect in regard to the estate entailed*, I think that the
" terms here employed must be held sufficient.

" I do not find in any reported case, except the late case of
" *Sharpe*, that the words of the entail in this part of the irritant
" clause were exactly the same as they are here; though I have
" an impression that a similar clause had been found to be suffi-
" cient. In the case of Sharpe, the same words ' shall be of *no*
" ' *force, strength, nor effect,*' &c., occurred. But there was a
" defect in the grammar of the clause, the nominative which

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"should have applied to the words 'shall be' having been altogether omitted. That created the only doubt in this Court; and a very serious ground of doubt it certainly was. It does not appear to have been thought at all doubtful, that the words otherwise were sufficient. Another difficulty, certainly, occurred in the House of Lords, arising from the connection of the previous words in that case, and from the mixture of debts, deeds, *crimes*, and acts. The judgment of the Court was reversed, not, as I understand the decision, upon any idea that the words 'shall be of no force, strength, nor effect,' would not have been sufficient, if the clause had been otherwise perfect, but on the principle that, in a question of strict entail, it is inadmissible to supply any words, and that the most favourable construction must be given of which the words in connection with which they stand will admit. But indeed it was afterwards explained, that the judgment in that case was incorrectly drawn up, and that there was no intention to do more than to find that there was no irritant clause in that entail *valeat quantum*.—Maclean and Robinson, vol. i., p. 908.

"On the whole, therefore, though the question is not quite so clear as the points already considered appear to me to be, I think that the irritant clause also in the present case is sufficient.

"IV. There is a fourth question of a different nature. That question is, whether certain special lands called *Drumniachie* have been effectually brought under the fetters of the entail?

"This part of the case appears to me to be attended with very considerable difficulty. From the nature of the titles, and the manner in which these lands were dealt with by the entailer himself, I think it impossible to hold, that they were validly entailed as *part and pertinent* of the other lands by the mere force of the original entail. The question, therefore, is, whether the supplementary entail, by which these lands were disponed to the heirs called by the former deed *under all the*

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"*provisions and restrictions of that entail* in general terms, "without the limiting and irritant clauses being *engrossed in* "*the deed itself*, was sufficient to constitute a binding entail *by* "*reference*, in a question with third parties creditors of the heir "in possession.

"It appears that that supplementary deed was recorded in the "register of tailzies; in which the original entail had also been "recorded. But, from the nature of the supplementary deed, the "entailing clauses did not appear in it. It is stated, however, "that a crown charter was obtained, containing the whole lands, "both those in the original entail, and the lands of Drumniachie, "as disponed by the supplementary deed—which charter con-"tained *ad longum* the whole clauses, prohibitory, irritant, and "resolutive,—applied, as I understand, to all the lands in the "charter; and that on the precept in that charter seisin followed, "all the clauses being again repeated in the instrument.

"In this state of the titles, the question seems to me to be, "whether it can be held, that there is an effectual entail of the "lands of Drumniachie, *duly recorded, in the terms of the statute*, "*in the register of tailzies*; and whether that other provision of "the statute has been complied with, which requires that the "clauses irritant and resolutive shall be inserted in the *procura-*"*tories of resignation*, charters, *precepts*, and instruments of seisin. "The clauses are not inserted in the procuratory of resignation in "the supplementary deed, and they do not, of course, appear in "that deed as registered in the register of tailzie. It is perfectly "true, as the defender argues, that, where there is, *in one and* "*the same deed*, a full recitation of the entailing clauses in the "*dispositive* clause, or in the *procuratory of resignation*, it has "been held, and may be considered as settled law, that it is suffi-"cient, if, in the *precept of seisin*, the clause be referred to in "general terms as so before recited. This has been held ever "since the case of Murray Kinninmond, July 5, 1744, as reported "by Kilkerran—and also by Monboddo, Br. Suppl. 5. 739.

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" And therefore it would be no objection to the validity of this " entail, that, in the charter which followed upon it, the clauses " were not *verbatim* recited in the *precept* of seisin of that char- " ter. But this rule of construction in the application of the " statute is distinctly rested on the ground, that, where the whole " clauses are *within the deed* in which the *precept* referring to them " is contained, the whole deed ought to be considered as the pre- " cept or warrant for the seisin to follow.

" There is no doubt that it has been found in various cases " that an entail may be effectually made by reference from one " deed to another. It was so found in the case of Don, 5th " February 1713, and in the late case of Hope Vere, 5th March " 1833. But, in both these cases, the question undoubtedly was " *inter hæredes* only; so that the proper operation of the statute, " as against creditors, was not brought into discussion. For " though, in the last of them, the pursuer concluded in general " terms that he was entitled to hold the lands without being " subject to any conditions or limitations, there was a qualifica- " tion even of that conclusion, '*at least* subject to no valid prohi- " ' bition *against altering the order of succession*;' and the case " was tried simply as a question *inter hæredes*. No sale had been " attempted; and it is a mistake to say, as the pursuer does, that, " if there be an effectual entail *inter hæredes*, the Court will try " a question concerning the possibility of a valid sale being made, " where no sale has been attempted: They have repeatedly refused " to do so.

" The case of Laurie *v.* Spalding, July 24, 1764, is, however, " materially different. For, as I read that case, it certainly did " come to be a question between an heir-substitute of entail and " a purchaser; and one general plea maintained for the purchaser " was distinctly, that the entail of the lands of Ervies, by mere " *reference* from one deed to another, could not be effectual " against creditors and purchasers, as not being duly recorded in " terms of the Act 1685. The case was perplexed in its circum-

" stances; and there was a specialty strongly urged, which almost " certainly affected the decision, that the purchaser had dealt with " the heir in possession at a time *when he had only a personal* " *right to the property;* in which case the general rule is, that the " purchaser is affected by all the qualities of his author's title. " Accordingly, I find, that, that case having been appealed, this " was the point mainly relied on in the respondent's appeal case. " Nevertheless, if there were no authority against it, I should " find it difficult to extricate that case from the peculiarities of " the titles which had been constituted in the vendor before the " question came to be tried.

" But any judgment pronounced in so special a case cannot, I " should think, in any view, be considered as sufficient to settle " so important a point of law. It appears to me, that the terms " of the statute 1685 require the clauses to be inserted in the " *procuratories of resignation* and precepts of seisin of the *entails* " *themselves*, and not merely in the conveyances and charters and " seisins to follow thereon. And it clearly supposes, or rather " indeed peremptorily requires, that the entail, *with all the clauses* " *expressed therein*, shall be recorded in the register of tailzies. " It is not enough that the clauses are in the *register of seisins.* " A *special* register was provided, that creditors and purchasers " might with ease and certainty know what the condition of the " party with whom they dealt as a proprietor in the fee was. " Such a register would have been a very useless arrangement, if " the act had not required, as an essential quality of the tailzies " to be allowed, that all the clauses should be engrossed *in the* " *deed to be so recorded.* The words of the act are clear and un- " ambiguous. The clauses must be in the tailzies; but not only " so—they must be in the *procuratories of resignation* and *pre-* " *cepts of sasine* in *that* deed. I have no doubt that this is " necessary, and I do not think it at all inconsistent with this " opinion to hold, according to the decisions, that, if the clauses " be in any part of *the same* deed, they will be held to be in the

" procuratory or precept. They will still appear in the *deed* " *registered;* and the *creditor* or *purchaser*, who has no occasion " to look farther, will find them there.

" But how does the matter stand on such a deed as the sup- " plementary entail here in question? The clauses of restriction " are not in it at all. Let it be recorded; but when the creditor " looks at it in that register, he can discover nothing *specific* to qua- " lify the title of the proprietor in the fee. To refer him to another " entail, or another title as to a different estate, is contrary to the " statute. He must find *the* entail of *this* estate, in regard to " which he contracts, in the register, with all the necessary " clauses engrossed; and he can find no such thing. There are " thus two departures from the statute. 1. These clauses pro- " hibitory, but more especially the *irritant* and *resolutive clauses*, " are not '*insert in the procuratories*,' &c.; and 2. There is no " *recorded* entail with those clauses so engrossed.

" These considerations present great difficulties in the statu- " tory principle. Bnt the case of Bromfield *v.* Paterson very " greatly increases the difficulty. The Lord Ordinary is perfectly " right in his observation, that the case, as reported, is only in the " first decision of it, and that, having been appealed it was after- " wards remitted, and another judgment pronounced. But his " recollection is wrong as to the result of that judgment. The " House of Lords had been led to know that there were parties " interested, substitute heirs of entail, beyond those who had first " appeared, and against whom complicated grounds of personal " exception were maintained; and they remitted the case, in " order that these other parties might be heard. But when they " did appear, what was the issue and result? There was con- " siderable difficulty in the question, whether the deed of entail " dated in 1758, should be considered as a new entail, requiring " to be *complete* and *registered* under the Act 1685, to make it " effectual against creditors, or was merely a renewal of the " original entail referred to. That question was what constituted

" the whole perplexity of the case. But, as soon as that was " held affirmatively, the consequences were at once and decidedly " declared—1. That it could not be effectual without registration " in the register of tailzies; but 2. That, *registered* or *not*, it " could not have any effect against the creditors, because the " clauses prohibitive, irritant, and resolutive, were not contained " *in it*. The final judgment of the Court here was, that that " deed was to be considered *as a new settlement*, ' and *not* having " ' *contained* the clauses prohibitive, irritant, and resolutive, *and* " ' not having been recorded in the register of entails, is not an " ' effectual entail: Find, that, *in respect the clauses irritant* " ' *and resolutive in the entail* 1743 *are not particularly inserted* " ' *in the disposition* 1758, *the same*, though held as a conveyance, " ' *is not effectual against creditors*,' &c. There can be nothing " more precise than this. I cannot possibly understand it other- " wise than as an authoritative judgment, that a new settlement " which required registration as an entail, but *which did not con-* " *tain in itself* the clauses prohibitive, irritant, and resolutive, " could not be effectual as an entail against creditors.

" There is no denying that the supplementary entail in the " present case is a new settlement. The plea to the contrary is " very faint, and evidently not tenable. It is much more " decidedly a new settlement than the deed 1758 was in the case " of Paterson. For it is a conveyance of lands, which were not " comprehended in the original entail, and which, but for it, " would have stood on the fee simple titles in the person of the " entailer. And if, then, it is within the same rule with that " case in the application of the statute, it cannot be enough to " say that, such as it was, it was recorded in the register of " tailzies. For the *very first ratio* of the judgment in the case of " Paterson is, that the *deed itself did not contain* the restrictive " clauses—the non-registration being put as a *separate* ground; " and then the last finding is pointed and explicit, that, in " respect those clauses were *not inserted in the disposition* 1758,

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" the entail was *not effectual against creditors*. That judgment " was *simpliciter*, affirmed on the second appeal—and, this, not- " withstanding that the very plea now maintained on the efficacy " of an entail by reference, even against creditors, was specifically " stated in the *third reason of Appeal*, and the case of *Laurie* " *and Spalding* most particularly referred to in support of it.

" I am not able to resist the weight of that authority, more " especially as I cannot feel at all confident that there is any " authority the other way. Certainly, the result in the case " of Paterson appears to be the most consistent with the terms " and the spirit of the statute.

" And I am, therefore, of opinion, though not without being " sensible of the difficulty of the question, that the demand of the " pursuer in this part of his case ought to be sustained: that " these lands of Drumniachie are not validly entailed against " creditors, and are therefore liable to the pursuer's action.

" JAMES W. MONCREIFF.

" We concur, " A. MACONOCHIE.
" J. H. FORBES.
" H. COCKBURN.
" J. CUNINGHAME.
" J. A. MURRAY.
" J. IVORY.

Thereafter the Court pronounced the following interlocutor, 2nd March, 1844:—" The Lords having resumed consi- " deration of this case, with the opinions of the consulted Judges " in the conjoined actions of declarator, and of declarator and " adjudication,—repel the objections stated to the validity and " effect of the entail of the lands and estate of Aboyne, rights " and others therein contained; sustain the defences, and assoilzie " the defenders from the conclusions of the libel of declarator, " and of the libel of adjudication, in so far as relates to the said " lands and estate, rights and others, and decern. But in respect

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" to the lands of Drumniachie; find, that the deeds of entail " in question are not effectual to save or protect those lands from " the acts, debts and deeds, of the Marquis of Huntly; therefore " find and declare that the same fall under the sequestration " libelled, and were adjudged in terms of the Statute passed " in the 2nd and 3rd years of Her present Majesty, cap. 41, and " pertain and belong to the pursuer, Donald Lindsay, as trustee " on the sequestrated estates of the said Marquis of Huntly, for " payment and satisfaction of the debts due by his Lordship, " and decern, and find no expenses due by either party to the " other."

Mr. Kelly, *Mr. Sandford*, and *Mr. Anderson*, for the Appellant.—The prohibitory clause does not contain any prohibition against the contracting of debt, all that it does is to prohibit the heirs from "burdening" the lands, a debt contracted by the heir may affect the lands ultimately by the measures adopted by the creditor for his payment, but cannot, in legal language, be said to be a burden on the lands,—a burden is not the consequence of another act, but is an act itself directly charging the land,—all the instances cited in *Ersk.* ii. 3, 49, are of this nature. To hold that a prohibition to burden is a prohibition to contract debt, can only be arrived at by giving to contraction of debt one of its possible consequences. Even if this could be done, the prohibition would still not be effectual, as it has repeatedly been found that it will not do to prohibit the consequences of an act, but that the act itself must be prohibited. Now, the act to be prohibited is in the terms of the Statute.

[*Lord Chancellor.*—What is the reason why conveyancers do not use the words of the statute?]

It is impossible to tell. The act to be prohibited is the contracting of debt, but the act which is prohibited is the mere consequence of the other; the two cannot be held to be identical without confounding the act with its consequences, without

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[illegible] the act of the heir with the act of the heir, and without [illegible] those principles of strict construction which [illegible] and which altogether repudiate the [illegible]

The point [illegible] is [illegible] by the terms of the Act [illegible] which are specially directed to the act of the heir in contracting personal debt, upon which real diligence might follow, which is quite a different act from executing a deed which immediately charges the lands. That it was so considered by the framers of the statute is shown by a variety of entails made shortly after the date of the act, one of them framed by Sir G. McKenzie, the framer of the statute itself, in all of which the contraction of debt is treated as a distinct act from burdening the lands.

If there be no substantive prohibition against contracting debt, that cannot be supplied by the clause which prohibits the heirs from "doing any act or granting any deed whereby the lands may be affected," &c. these expressions are applicable to cases of civil or criminal delinquency, and have always been so construed. The statute has in view other acts than selling and contracting debt, and this clause applies to these other acts. Sinclair v. Sinclair, *Mor.* 15,382; Tillycoultry case, *Mor.* 15,539; Brown v. Dalhousie, *Mor. App.* Tailzie, p. 73; Nisbet v. Moncrieff, 2 *S. & D.* 381.

The judgment of the Court below proceeded mainly on the authority of three cases. The first of these was, Haggart v. Agnew, 20 *F. C.* 223; no reasons are given for the judgment, which was that only of one branch of the Court, and while as yet the rules of interpretation were by no means clearly fixed; and, moreover, the sum at stake was trifling, being only 24*l*. In McKenzie v. McKenzie, 2 *S. & D.* 331, the next case, the report of which is very short, there does not appear to have been much argument,—no reasons are given for the judgment, and it was never carried to appeal. but, moreover, the question

raised was different from the present, for the prohibition was in terms against the contracting of debt.

[*Lord Chancellor.*—The words were contracting debt on the lands, that was burdening.]

Yes; but in the present case there is no prohibition of the act of the heir in contracting debt, there there was. The last of the cases alluded to was Nisbett *v.* Moncrieff, 2 *S.* & *D.* 381, that proceeded on the assumption that the case of McKenzie had already decided the point, and was in truth but an echo of that case; no other reason was given. All of these cases carry but the authority of the Court below, in none of them were the questions raised settled by the Judgment of this House; but after them arose the case of Cathcart *v.* Cathcart, 5 *W.* & *Sh.* 531; there the prohibition was "to burden with infeftments of annual rent, or "any other servitude or burden," and though the case was decided upon the question as to whether a debt had really been *bona fide* contracted, yet Lord Brougham expressed himself to the effect, that he inclined to think "there was no effectual "prohibition to contract debt;" the Lord Ordinary had specially found that there was none, and the late Lord Eldon, who had been consulted while at the bar, had given an opinion to the same effect.

The judgment in the present case would not have been given, it is believed, but for the weight of those previous authorities, in none of which any reason had been assigned upon the statutes or otherwise. This House, however, is not bound by these precedents.

[*Lord Campbell.*—Where there is a series of authorities on questions of real property which have stood for years, and been acted on, the House feels itself almost bound by them.]

From what is said in Sandford, p. 269, it can hardly be said that the profession had acquiesced in these judgments.

II. The resolutive clause is so ambiguous in its terms in that part which irritates the heir's right by contravention of the pro-

hibitions, that it cannot receive effect. It commences by speaking of the "before written conditions, provisions," &c., and then goes on to explain this by saying, "that is, if the heirs shall fail "to perform the said *other* conditions and restrictions." So that this last part destroys the first, and makes it impossible to ascertain what conditions and provisions are really intended.

III. The irritant clause does not contain any declaration of nullity of the acts of contravention by the heirs. The first part declares that the lands shall not be affected by the debts, deeds, or acts of the heirs contravening; but that is a declaration not authorized by the statute, and which could not receive effect if the debts, deeds, and acts were otherwise valid but for this declaration, they would in such a case receive their legal effect, notwithstanding the declaration. The second part declares, that the debts contracted, deeds granted, and facts done in contravention, shall be of no force, strength, or effect, but this is only "against "the *other* heirs called to succeed;" and as the Marquis of Huntly, the institute, is not an heir, the effect is to leave his debts, deeds, and facts untouched, and to irritate only the debts, deeds, and facts of the heirs, as against the *other* heirs. To make an irritant clause effectual, it must in terms declare the acts intended to be embraced, to be null and void at the moment of their being done.—*Hope's Min. Prac.* 104; Mackenzie iii., 8, 3; Ersk. iii., 8, 25; Primrose *v.* Dunipace, *Kilk.* 540.

IV. The irritant clause is further defective inasmuch as it does not embrace sales. All that is irritated is debts, deeds, or acts, by which the estate is burdened, or for which it may be liable.

V. The supplementary deed of entail of the lands of Drumniachie, is void, as no entail can effectually be made by mere reference for the restrictions to a previous deed of entail, as the statute expressly requires, that in order to be effectual, the restrictions must be recited *verbatim*.

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The Lord Advocate and *Mr. G. Bell*, for the respondent, cited the following cases. Scott *v.* Crs. of Gala, *Mor.* 3673 and 15,553; *Ersk.* iii., 8, 30; *Bank.* ii., 3, 585; Haggart *v.* Agnew, 20 *F. C.*, 223; Mackenzie *v.* Mackenzie, 2 *S.* & *D.*, 331; Nisbet *v.* Moncrieff, 2 *S.* & *D.*, 381.

LORD CAMPBELL.—This is an action of declarator by the trustee upon the sequestrated estate of the Marquis of Huntly, that it may be found and declared that the deed of entail under which he possessed the estate of Aboyne, executed by his late father, is not sufficient to protect the estate from the diligence of creditors, in terms of the Act of 1685.

The Judges of the Court of Session have unanimously held the entail to be valid; and after a very careful consideration of the case, I am of opinion that the interlocutors appealed against ought to be affirmed.

The appellant first objects to the prohibitory clause, on the ground that it does not sufficiently prohibit the contracting of debt.

I cannot adopt the answer suggested to this objection (although it comes from a Judge generally distinguished for great caution, as well as great learning and acuteness,) that under the Act of 1685, no prohibitory clause is necessary. This dictum is contrary to the universal understanding of the profession, since the Act passed, to the doctrine laid dow by all the institutional writers upon the subject, to the principle on which various decisions have proceeded both in the Court below and in this House, and I think contrary to the plain language of the legislature, which, though it does not contain the word "prohibitory," requires that by the deed "it shall not be lawful to the heirs of "tailzie to sell," &c., that is, that they shall be prohibited from doing so. After a long established usage with respect to the prohibitory clause, I own I am rather surprised at finding an opinion unnecessarily thrown out, that it may be safely omitted. Experiments are good in science, but not in conveyancing.

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In this case, however, there is a prohibitory clause in these words, "that it shall not be in the power of the said George "Lord Strathaven, my son, nor of any of the other heirs succeed- "ing to the said lands and estate, to sell, alienate, wadset, im- "pignorate or dispone the same, or any part thereof, either irre- "deemably, or under reversion, or to burden or affect the same in "whole, or in part, with debts or sums of money, infeftments of "annual rent, or any other servitude or burden whatsoever."

The deficiency pointed out is, that the clause does not apply to the contracting of debt, and is merely a prohibition directed against burdening the land by a deed having that purpose, or doing any act whereby the land is immediately burdened with debt, so that the heir of entail might contract debts, not meaning in the first instance to burden or affect the lands with them, and afterwards allow the lands to be adjudicated for these debts, without infringing this prohibition. But I am of opinion that this is a prohibition against allowing the lands to be adjudicated for debts contracted by the heir, and therefore that it is sufficient. The Act, without prescribing any form of words, only requires an effect to be accomplished, that by the deed of entail, "it shall "not be lawful for the heirs of tailzie to contract debts whereby "the lands may be apprised, adjudged, or evicted from the sub- "stitute." The lands are to be protected for the benefit of the substitute from the heir of tailzie in possession contracting debt. The act does not say absolutely that he shall not contract debt, an injunction which could not possibly be observed by any person living in society, but only that he shall not contract debt whereby the estate may be burdened. If the prohibition were in the words of the statute, it would not be infringed by the mere contracting of debt, and not until adjudication made the debt a burden on the land. A prohibition against burdening the land with debt, and a prohibition against contracting debt, whereby the land may be adjudged or burdened, having the same legal operation, are substantially the same. If the heirs of tailzie were to contract debt,

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and allow the land to be adjudged for the debt, could it be contended that he had not "burdened or affected the same in whole "or in part with debt." The express prohibition in this case commences at the point where the more general prohibition would practically begin to operate.

The clause is not to be made good by reference or implication, but the language in which it is framed must receive its natural and grammatical construction.

Therefore, if the question were entire, I should have been strongly inclined to hold this clause to be sufficient. But there are three cases decided by the Court of Session, expressly in point, Haggart *v.* Vans Agnew, December 19, 1820; Mackenzie, May 23, 1823; and Nisbet *v.* Sir David Moncrieff, June 10, 1823. In two of these cases the prohibitory clause was identically the same as the present, and in the third it was the same in substance. In all the three the Judges of the Court of Session held the clause sufficient, and they proceeded on the older case of Gala, decided in 1722. None of these cases have been brought by appeal to this House, and we are not absolutely bound by them; but even if we doubted them, we should be very reluctant to overturn them, after so long an acquiescence, as many entails may have been framed upon their authority. They appear to me to have been well decided, and they enable me, without hesitation, to advise your Lordships to repel this objection. I may likewise observe, as was mentioned by my noble and learned friend in the first case mentioned to-day, that that is in accordance with many ancient entails which never have been considered exceptionable.

The next objection is to the irritant clause. The deed says, "that upon every contravention which may happen by and "through the said George Lord Strathaven, my son, or any of "the other heirs succeeding to the said lands and estate, their "failing to perform all and each of the conditions, or acting con-"trary to all or any of the restrictions before written, it is hereby

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" expressly provided and declared, not only that the lands and " estate before disponed, shall not be burdened with or liable to " the debts, deeds, or acts of the said George Lord Strathaven, or " any other of the heirs contravening, as is already herein pro- " vided, but also all debts contracted, deeds granted, and facts " done contrary to the conditions and restrictions appointed by " me, or to the true intent and meaning hereof, shall be of no " force, strength, nor effect, and be ineffectual and unavailable " against the other heirs called to succeed, and who, as well as " the said lands and estate, shall nowise be burdened therewith, " but free therefrom in the same manner as if such debts or " deeds had never been contracted or granted, or such acts or " omissions had never been done or happened."

The appellant contends, that this does not strike at the debts, deeds, and acts of the institute, and that the words of irritancy are not a sufficient compliance with the statute. But Lord Strathaven is expressly mentioned in the first part of the clause; and " all " debts, deeds, and facts contrary to the conditions and restric- " tions of the entail," are declared to be " of no force, strength, " nor effect." If the clause had there stopped, there can be no doubt that the debts, deeds, and facts of the institute would have been included in the irritancy, and that it would have been sufficient. How then is it vitiated by the words which follow, " and " be ineffectual and unavailable against the other heirs called to " succeed." These words do not confine the preceding part of the clause to the debts, deeds, and facts of the other heirs, excluding those of the institute, and in declaring that they shall be ineffectual and unavailable against the other heirs called to succeed, all is done that the law will allow, for they must be effectual and available against the heir himself, whose debts, deeds, and facts they are. Then follows the declaration, that " the " other heirs, as well as the said lands and estate, shall nowise be " burdened therewith, but free therefrom in the same manner as " if such debts or deeds had never been contracted or granted, or

"such acts or omissions had never been done or happened." There is not a declaration in the very words of the statute, that "all such deeds shall be in themselves null and void," but there are words which clearly express the legal effect of these words if they had been used, and which are therefore equally available.

Great reliance has been placed both in the printed cases and in the arguments at the Bar, upon a supposed decision of this House, upon an irritant clause, said to be similar to this, in Carrick *v.* Buchanan; but upon the occasion referred to the greatest pains were taken to make it understood that nothing was then decided. I myself then abstained from hinting any opinion upon that irritant clause; and since I have had full time to consider it, I have come to the conclusion that it is sufficient.

Upon the whole, I feel no difficulty in moving your Lordships that the interlocutors be affirmed.

There was a cross appeal, which we disposed of in the course of the argument respecting the lands of Drumniachie. These lands were not included in the original entail, and were sought to be entailed by a subsequent supplemental deed, referring to the former deed, but not itself containing the fettering clauses. With the exception of Lord Jeffrey, the Judges below all held that this entail was defective, and we were clearly of the same opinion, as a deed of entail must be perfect in itself, and on the face of it convey all necessary information to any one who reads it when recorded, of the fetters it imposes. This seems to be required by the Act 1685, and the authorities are strong to show that it is indispensable. Therefore, in both cases, I move your Lordships that the interlocutors be affirmed.

LORD BROUGHAM.—My Lords, in this case I entirely agree with my noble and learned friend; and he has so fully gone into the argument, so succinctly, but at the same time so clearly and satisfactorily, that it is unnecessary for me to trouble your Lordships any further. The costs must follow the event both in the cross appeal and in the other case.

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Ordered and Adjudged, That the original petition and appeal be dismissed this House, and that the Interlocutor, so far as therein complained of in the original appeal, be affirmed. And it is further Ordered and Adjudged, that the cross appeal be dismissed this House, and that the Interlocutor, so far as complained of in the said cross appeal, be affirmed with costs.

SPOTTISWOODE and ROBERTSON—F. T. BIRCHAM, Agents.

[Heard 19*th July*. Judgment, *5th September*, 1844.]

WILLIAM ADAM, Trustee on the sequestrated estate of ARCHIBALD FARQUHARSON, Esq., of Finzean, *Appellant*.

FRANCIS FARQUHARSON, Physician, in Edinburgh, *Respondent*.

Tailzie.—Terms of irritant and resolutive clauses held sufficiently expressed to embrace all the prohibitions in the prohibitory clause.

Ibid.—A prohibition "to burden the said lands in whole or in part, "with debts contracted," &c., held to import a prohibition to contract debt, satisfying the words of the statute.

ON the 27th of September, 1784, Francis Farquharson conveyed his lands and barony of Finzean, to trustees upon trust, to perform certain purposes, and thereafter to convey to a series of heirs, to be named in a relative deed of nomination and entail, under the conditions of such deed.

On the same day he executed the relative deed of nomination and entail. That deed contained the following clauses among others:—

"And with and under this restriction and limitation also, that "it shall not be in the power of the said William Farquharson, "or any other of the heirs of taillie and provision above written, "to sell, alienate, impignorate, and dispone the said lands, and "estate, or any part thereof, either irredeemably or under rever- "sion, or to burden the same, in whole or in part, with debts by "them contracted, or with any sums of money, infeftments of "annual rents, or any other servitude or burden whatsomever, "excepting only as is hereinafter exprest; nor shall it be in the

" power of him, or any of the saids heirs, to do or commit any act,
" civil or criminal, or grant any deed, directly or indirectly, in
" any sort whereby the said lands and estate, or any part thereof,
" may be affected, adjudged, forefaulted, become escheat, or be
" confiscated, or yet any other manner of way evicted from the
" saids heirs of taillie, or whereby this present nomination, or
" other writ that may be granted by me, or the order of succession,
" may be anyways prejudged, changed, hurt, or frustrate. And
" with this further restriction and limitation, that it shall not be
" in the power of the said William Farquharson, or any of the
" above heirs of taillie, to sett tacks or rentals of the said lands
" and estate, or any parts thereof, for longer space than nineteen
" years, or for the lifetime of the tacksman, and one life more,
" when sett at the former rental, allowing in that case, either the
" same, or any succeeding heir, if at the time he have any issue
" in life who may succeed to the estate, to add the continuance
" of a new life to every tack as oft as any of the two former lives
" shall faill. But that none of the said heirs shall have power to
" sett any tacks with a diminution of the former rent, except in
" case of necessity, and then to be sett only for three years, at the
" best rent can be got, without taking any grassum. And that
" none of the heirs shall *in lecto*, set tacks of any part of the saids
" lands, nor shall, even in *liege poustie*, grant any tack of the
" manour-place of Finzean, gardens, parks, and inclosures thereof,
" for any longer space than the granter's own lifetime. And with
" and under this restriction and limitation also, as it is hereby ex-
" pressly conditioned and provided, that the said lands and estate
" shall be noways affected or burdened with, or subjected or liable
" to be adjudged, or any other way evicted, either in whole or in
" part, for or by the debts and deeds legal or voluntary, contracted
" or granted by the said William Farquharson, or any other of
" the said heirs of taillie, substitute to him as above, whether
" before or after their succession to, or obtaining possession of,
" the said lands and estate, nor with, for, or by the crimes of

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" omission or commission, or acts civil or criminal, committed and " done, or to be committed and done by them prior or posterior " to their succession. And sicklike, with and under the follow- " ing irritancies, viz. It is hereby expressly provided and de- " clared, that in case the said William Farquharson, or any " other of the heirs of taillie, substitute to him as above, shall con- " traveene any of the before-written conditions, provisions, limi- " tations, and restrictions. That is, shall fail or neglect to obey " and perform the haill conditions and provisions above sett down, " or any of them, or any other after conditions and restrictions " that may be added by me. That then, and in that case, the " person or persons so contraveening by failing to obey the said " conditions, or by acting contrary to the above limitations and " restrictions, or any of them, shall for himself or herself only, " (excepting in the case of commission of high treason,) *ipso facto*, " amitt, lose, and forfeit, all right, title, and interest, which he or " she hath to my said lands and estate, and the same shall become " void and extinct, and my said lands and estate shall devolve, " accresce, and belong, to the next heir of taillie appointed to " succeed, albeit descended of the contraveener's body, in the " same manner as if the contraveener was naturally dead. But " if the said William Farquharson, or any of the above heirs of " taillie, shall commit high treason, then such person shall forfeit " and lose all right and title to my estate, not only for him or " herself, but for the haill descendants of their bodies, and my " said lands and estate shall devolve upon the next heir called to " the succession after him or her who committed high treason, " and their whole descendants in the same manner as if he, she, and " their descendants, were all naturally dead. And upon every con- " travention which may happen by or through any of the saids " heirs of taillie, their failing to obey and perform all and each of " the before-mentioned conditions, or acting contrary to all or any " of the restrictions above written, it is hereby expressly provided " and declared, that not only my saids lands and estate shall not

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" be burdened or lyable to the debts, deeds, crimes, and acts of " the heirs of taillie so contravening, but also all debts, deeds, or " acts contracted, granted, done, or committed, contrary to the " above conditions and restrictions, or to the true intent and " meaning of these presents, shall be absolutely void and null, and " of no force, strength, or effect, and ineffectual and unavailable " against the other heirs of taillie; and who, as well as the saids " lands and estate, shall not be burdened therewith, but free " therefrom, in the same manner as if such debts and deeds had " never been contracted, granted, or done, or such acts, omissions, " or commissions, had never been done, or happened. And it " shall be free and lawfull to every heir, though minor at the " time, who shall have a title, by and through any contravention " or irritancy incurred by a former, to sue and obtain declarators " upon the contravention, and of the irritancy of the contravener's " right, or to serve heir to the person who dyed last vest and " seized in the said lands and estate preceding the contraveener, " and thereby, or by adjudication, or any other legal or formal " method, to establish in his person, the right and title of and to " the saids lands and estate, and that without being subjected or " lyable to the debts or deeds of the person or persons contra- " veening, or irritating their right, and without regard to any " alteration made, or intended acts done, or deeds granted by the " contraveener, contrary to the conditions and restrictions before " written, or others that may be appointed by me. But all " the heirs of taillie succeeding upon any contravention, and heirs " succeeding to them, shall always be subject and lyable to the " same conditions, restrictions, and irritancies, throughout the " whole course of succession for ever."

On the 3rd and 19th April, 1790, the trustees conveyed the lands to the heir then entitled, in terms of the deeds of 1784, and under the particular conditions contained in the latter of these deeds.

In 1796, Archibald Farquharson became the heir entitled to

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succeed, and made up his titles under the deeds which have been mentioned.

In 1831, the real and personal estates of Archibald Farquharson were sequestrated under the 54 Geo. III. cap. 137, and vested in the appellant as trustee.

In 1839, the appellant brought an action against Archibald Farquharson and the other heirs of entail, concluding to have it declared, "That the lands were not, by both or either of the aforesaid "deeds of 1784, and 1790, validly entailed; and that, by the said "deeds, or any clauses, prohibitory, irritant, or resolutive, therein "contained, the said Archibald Farquharson, now of Finzean, "and the other heirs called to the succession, were not validly "restricted, restrained or prohibited from altering the said pre-"tended entail, or altering the order of succession, or from selling, "alienating, burdening with debts, and letting or otherwise dis-"posing at pleasure of the said lands and estate, as fully, freely "and absolutely, as any proprietor of lands in fee-simple may or "can do by the law of Scotland: And that the said lands were "subject and liable to and for the debts and deeds of the said "Archibald Farquharson, and that the pursuer, as trustee fore-"said, and his successors, have full and undoubted right and "power, and a valid and unchallengeable title to sell, alienate "and dispone, and to grant tacks or leases, or otherwise to dispose "of the several lands, teinds and others, in the aforesaid dispo-"sitions, and other writs described, and to make, execute and "deliver all contracts, dispositions, conveyances, tacks, deeds and "other writings, requisite for effectually conveying, letting or "otherwise disposing of the whole or any part or parts of the said "lands and heritages, to purchasers, feuars, tenants or others, and "that as fully and freely as if none of the deeds or writings herein "mentioned or referred to, contained any restrictions, limitations "or prohibitions, to the effect before set forth," with consequential conclusions as to the validity of deeds to be executed by the appellant and his application of the price of any sale of the lands which he might effect.

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The appellant pleaded in support of this action,—

" I. The deeds libelled contain no irritant clause applicable " to the prohibitions against selling, alienating, and disponing.

" II. Neither do any of the deeds libelled contain a resolutive " clause applicable to the restrictions and limitations contained in " the prohibitory clause."

The defenders, in answer, pleaded,—

" I. The irritant and resolutive clauses of the entail are effec- " tually applied to the prohibitive clauses; and generally the " whole fetters of the entail have been validly imposed.

" II. The titles called for in this reduction constitute a valid " and effectual tailzied investiture of the estate, in terms of the " statute, and are not liable to be set aside on any ground " whatever."

The record was closed upon the summons, defences, minute, and pleas in law; and upon advising these papers and hearing parties, the Lord Ordinary (*Cuninghame*) pronounced the following Interlocutor, on the 20th March, 1840: " Finds that " Archibald Farquharson, esquire, the principal debtor, possesses " the estates upon deeds of tailzie, containing complete and " effectual prohibitions, in terms of the Act 1685, against alien- " ating the estate, contracting debt thereon, and altering the " order of succession: Finds that the said deeds of tailzie also " contain resolutive and irritant clauses in the most comprehen- " sive terms, sufficient to render the said prohibitions effectual, " in terms of the statute; therefore repels the reasons of reduc- " tion, sustains the defences, and assoilzies the defender from " this action and decerns."

The appellant reclaimed against this Interlocutor, and on the 18th June, 1840, the first division of the Court pronounced the following Interlocutor: " Having advised this case, and heard " counsel for the parties, adhere to the Interlocutor reclaimed " against, refuse the desire of the reclaiming note."

The appeal was against these Interlocutors.

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Mr. Kelly, *Mr. Anderson*, and *Mr. Hector*, for the Appellant. —I. The irritant clause here is not a general one, but merely enumerative, and the acts enumerated are, "debts, deeds, or acts "contracted, granted, done, or committed, contrary to the above "conditions and restrictions." After declaring that the acts in contravention shall be void, as against the other heirs of tailzie, the clause goes on to say that neither the heirs nor the lands shall be "burdened" therewith. None of these expressions in terms apply either to sale or alienation, and so far as they can have effect by reference to the prohibitory clause, "acts and deeds" are by such reference satisfied by those acts and deeds there mentioned, in connection with doing or granting any deed which may infer forfeiture or any thing whereby the order of succession might be changed or frustrated; but in that part of the prohibitory clause which relates to sale and alienation, the words "acts and deeds" never once occur; and while the irritant clause follows almost verbatim the terms used in that part of the prohibitory clause which relates to forfeiture, it is expressed in terms quite different from, and makes no reference to, that part which relates to sales and alienation. The construction contended for, moreover, is favoured by the expressions in the irritant clause, as to neither the heirs nor the lands being "burdened" by the act done in contravention, one which, upon no construction, can be made applicable to sale or alienation. Acts and deeds, no doubt, are flexible terms, and might be used in such a general sense as to include all acts of contravention, but the prohibitory clause gives the rule for their interpretation, and as in that clause they are used in a limited sense, to signify something different from selling or alienating, they cannot in the irritant clause receive a more general and extended signification, so as to embrace these acts. The authorities referred to in support of this branch of the argument were Sinclair *v.* Sinclair, *Mor.* 15,382; Bruce *v.* Bruce, *Mor.* 15,539; Campbell *v.* Wightman, *Mor.* 15,505; Dick *v.* Drysdale, 16 *F. C.* 460; Henderson

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v. Henderson, 19 *F. C.* 29; Barclay *v.* Adam, *Hume*, 877; Speid *v.* Speid, 15 *D. B.* & *M.* 618; Rennie *v.* Horne, 3 *Sh.* & *M'L.* 142; Lang *v.* Lang, 1 *M'L.* & *Rob.* 871; Thomson *v.* Milne, 1 *D. B.* & *M.*, 2nd series, 592.

II. The entail does not contain any prohibition against contracting debt, all that it does is to prohibit the heirs from "burdening" the lands. [The argument upon this point was the same as in Lindsay *v.* Aboyne, for which see *supra*, p. 285.]

III. The resolutive clause does not apply to the restrictions and limitations in the prohibitory clause. In that clause conditions and provisions are used as distinguished from restrictions and limitations, and are applied to things directed to be done, while restrictions and limitations are applied to things directed not to be done. In the resolutive clause this distinction is kept up by the whole being mentioned in the outset of it as distinct things, and had the use of them been continued throughout, no question could have been raised upon the clause; but after thus enumerating the whole, the operation of the clause is limited to failure in performance of the "conditions and provisions" only, the words which follow, "or any other after conditions and "restrictions that may be added by me," do not alter the effect of this, as they evidently refer not to conditions and restrictions already existing, but to be thereafter made.

[*Lord Brougham.*—Is not a restriction a provision?]

It may be, but not in this entail, where the words are used to mean different things.

The Lord Advocate, *Mr. Stuart*, *Mr. Munro*, *Mr. M'Farlane*, and *Mr. Johnstone*, for respondents, cited *Ersk.* iii. 3, 49; Lumsden *v.* Lumsden, 2 *Bell*, 104; Scott, *Mor.* 3673; Haggart *v.* Agnew, 20 *F. C.* 223; M'Kenzie *v.* M'Kenzie, 2 *S.* & *D.* 331; Nisbett *v.* Moncrieff, 2 *S.* & *D.* 381; Lindsay *v.* Aboyne, 4 *D. B.* & *M.* 843.

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LORD CHANCELLOR.—My Lords, the first question raised in this case was as to the sufficiency of the irritant clause. It was contended that it did not apply to the prohibition against selling or alienating the estate.

The words of that clause are sufficiently extensive to reach every act of contravention. "Upon every contravention not only "the estate shall not be burthened or liable to the debts, deeds, "crimes, and acts of the heirs of entail so contravening, but *also* "all debts, deeds, or acts contracted, granted, done, or committed "contrary to the above conditions and restrictions, shall be abso- "lutely null," &c. The effect of the clause is to annul all deeds granted and all acts done contrary to the conditions and restrictions contained in the deed. The words are quite general, and in construction apply, without exception, to all the conditions and restrictions.

Some reliance was placed in the argument upon the subsequent words, viz. "And of no force, strength, or effect, and "ineffectual and unavailable against the other heirs of taillie, "and who, as well as the said lands and estate, shall not be "burthened therewith, but free therefrom, in the same manner "as if such debts and deeds had never been contracted, granted, "or done, or such acts, commissions, or omissions had never been "done or happened." Although this passage is superfluous, it is not inconsistent with that which precedes it. After declaring an instrument null and void, there is no inconsistency in also declaring it ineffectual against the lands and the heirs of entail.

As to the cases which were cited at the Bar, with respect to the former part of this clause,—I allude particularly to Lang *v.* Lang, and Barclay *v.* Adam,—it is sufficient to observe, that in each of those cases there were words of reference or restriction, which limited the general application of the terms, and on which ground alone these cases were determined. No such words of reference are to be found in this clause. I think, therefore, the irritant clause is sufficient.

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The next objection raised was as to the sufficiency of the resolutive clause, that it does not apply to the restrictions and limitations contained in the prohibitory clause. This objection is founded upon a supposed distinction made by the entailer between the conditions and provisions stated in the deed and the limitations and restrictions which it also mentions. The resolutive clause, it is contended, is confined to the former, and does not therefore prevent the altering the order of succession, or the sale of the estate, or the burthening it with debts.

It does not appear to me that there is any real difficulty in the interpretation of this clause. It begins by declaring that "in case any of the heirs of tailzie shall contravene any of the "before-written conditions, provisions, limitations, or restric-"tions,"—and then proceeds thus, "that is, shall fail or neglect "to obey and perform the haill conditions and provisions above "set down, or any of them." It is clear that the word "pro-"visions," which is general enough to include limitations and restrictions, was here intended to include them, for otherwise this part of the clause would be inconsistent with the former, which could not have been the intention of the framer of the deed.

The clause then goes on thus, "or any other after restrictions "that may be added by me," which is quite consistent with what precedes it; and the clause terminates in these words, "That "the person so contravening, by failing to obey the said con-"ditions, or by acting contrary to the above limitations and "restrictions, or any of them, shall forfeit the estate," which applies in construction to all that goes before, to all the conditions, limitations, and restrictions before-mentioned.

It is suggested that the "above limitations and restrictions" mean the limitations and restrictions which might thereafter be added; but there is no ground for thus confining the application of these terms; I am satisfied, therefore, as to the sufficiency of the resolutive clause.

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But the most important point remains to be considered. It is said, that there is no prohibition against the contracting debts by the heirs of entail. The words are these, "that it shall not "be in the power of the said William Farquharson, or any "other of the heirs of tailzie, or provision, to burthen the said "lands and estate, in whole or in part, with debts by them "contracted, or with any sums of money, infeftments of annual "rents, or any other burthen whatsoever, excepting only as "thereinafter expressed." The objection is this:—The prohibition is merely against burthening the estate, or any part of it, with debts, which imports, it is said, by the obvious meaning of the terms, a direct charge upon the estate, or upon some part of it, and it is widely different from a mere prohibition to contract debts, and the rule is, that entails are to be construed strictly. Debts, if contracted, may be paid out of other funds, out of the income of the estate, or if not paid may never be enforced or attempted to be enforced against the estate. If then the heir of entail is left at liberty, by the terms of the prohibitions, to contract debts, it follows that the creditor may adjudge the estate for the amount of the debt; for all the legal consequences, as far as third persons are concerned, must follow from what the heir of entail is permitted to do.

The question is undoubtedly one of some nicety, and different opinions seem to have been entertained with respect to it. But the weight of authority is strongly in favour of the sufficiency of the prohibition. When this case was before the Lord Ordinary no objection was taken to the prohibitory clause. That learned Judge thus expressed himself: "In the first place, it is manifest "and admitted on all hands, that the prohibitory clauses of the "deed of nomination are complete in all the branches of prohi-"bition required by the Act of 1685. As this was fully con-"sidered on both sides of the Bar, no further comment is neces-"sary, except to keep in view that the prohibitions are full, "minute, and specific as they ought to be."

So also when the case came upon review before the Judges of the First Division, no objection was raised as to the sufficiency of the prohibition. This, however, does not preclude the appellant from insisting upon the defect upon the appeal to your Lordships.

In considering this objection it must be observed, that the Act of 1685, which empowers the entailer to impose conditions on the heirs of entail, whereby it shall not be lawful for them (among other things) to contract debts, does not stop at those words, but proceeds thus, "whereby the lands may be apprized, "adjudged," &c. The condition, therefore, that may be imposed is not simply that the heir shall not contract debts, but that he shall not contract debts "whereby the estate may be adjudged," &c.; and it has been decided that the word *may* in this clause is to be read as *shall*. See the Gala case, *Kaimes*, 34; *Dictionary*, 3673, 1738, 15,500; *Erskine*, 3, 8. 30. The prohibition, therefore, is to contract debts, whereby the estate shall be adjudged, or, as Lord Jeffrey states, in the Aboyne case, shall be actually adjudged or attempted to be adjudged.

A prohibition to contract debts without any qualification would prevent the heir of entail from engaging in any of the ordinary affairs of life, and even contracting for necessaries. The meaning obviously is to contract debts, followed by such consequences as I have stated, that is, to contract debts that shall affect the estate, that shall become a burthen upon the estate, or, in other words, to burthen the estate with debts. This was the construction put upon the Act in the Gala case, as far back as the year 1722, and is, I think, the correct and proper construction.

If it be objected that where the entail is complete, the estate cannot be actually adjudged, the obvious answer is, that in like manner none of the prohibited acts can actually operate to affect the estate, for they are in such cases made void against the estate, and against the heirs of entail. The acts therefore must be taken

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to be such acts as would charge or burthen the estate, were it not for the prohibition. I think, therefore, to contract debts by which the estate may, that is, shall be adjudged, is to burthen the estate with the debts, and within the strict interpretation of the prohibition.

Reliance was placed in the argument upon the form of some ancient deeds of entail, and upon the precedents in different treatises on conveyancing. But in the Aboyne case this observation was met by reference to many instances of entails corresponding in substance with the present, containing merely a prohibition against burthening the estate with debts, and precedents to the same effect are to be found in different collections.

Several decisions were cited in support of this construction. The first is Haggart *v.* Vans Agnew. The prohibition in that case was substantially in the same terms as the present. The heirs of entail were forbidden to burthen the estate, in whole or in part, with debts, sums of money, &c., or to commit or grant any act or deed, civil or criminal, whereby the said estates, or any part thereof, might be affected, apprized, adjudged, &c. The Court was unanimously of opinion that the clause was sufficient to protect the estate from the personal creditors of Vans Agnew. *Faculty Collections*, December, 1820.

In the case of Mackenzie *v.* Mackenzie, the prohibition was against contracting debts on the lands. The Lord Ordinary in that case found, "That the deed of entail was sufficient to protect "the estate against being affected, burthened or adjudged by the "debts in question." The Court adopted the same view. The words were not precisely the same as in the present case; but there seems to be no substantial distinction between "contracting "debts thereon," and "burthening the same with debts."

In the subsequent case of Nisbett *v.* Moncrieff, the prohibition was expressed precisely as in the present entail, and the Court held it to be sufficient.

The pursuer, in his argument, relies upon Lord Moncrieff's

opinion, expressed as Lord Ordinary in the Carleton case, but the Court did not adopt that opinion; it became unnecessary to consider it; and that learned Judge himself, afterwards, in the Aboyne case, drew a distinction between the vague words in the Carleton entail, and those which were then under consideration.

It is true that none of these decisions were reviewed in this House; and though the Court below might consider itself bound by them, they have not the same effect here. But upon a question of this nature, where the point has been repeatedly decided, and which decisions may and probably have been acted upon in framing instruments of this nature, your Lordships would not feel justified, unless in a case free from all reasonable doubt, in reversing such a series of decisions. And though the Aboyne case, as well as the present, is now under appeal, the consideration that the consulted Judges concurred in opinion upon this point with the Judges of the First Division, cannot fail to have influence with your Lordships.

Independently, however, of this weight of authority, I am of opinion that the prohibition in this case is sufficient.

LORD BROUGHAM.—My Lords, I entirely concur with my noble and learned friend, but I shall trouble your Lordships with my argument, because the case is of importance. These cases of Adam *v.* Farquharson, and Blaikie *v.* Farquharson, which are in truth one, raise the question upon the efficacy of an entail executed in 1790, of the estate of Finzean, by the trustees of Francis Farquharson, who created the trust in 1784, and appointed a destination of heirs by a deed of nomination of the same date. A reduction of the entail so executed by the trustees, was brought by the trustees on the sequestrated estate of the late Archibald Farquharson, heir of entail in possession, on the ground that the trustees of 1784 had, in 1790, exceeded their powers, and that the entail so made by them was reducible. But this ground was abandoned, and may be considered as never having been in controversy either below or

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here. A declaratory conclusion, however, was joined with the petitory conclusion for reduction, to have the heir of entail in possession declared tenant in fee simple, on the ground of the clauses irritant and resolutive not having been valid to prohibit alienation, sale, and altering the order of succession. Afterwards an objection was in a separate action taken to the validity of the prohibitory clauses, this having been omitted in the original suit.

With respect to the argument as to the prohibitory clause, I may state in one word only, because I believe it is unnecessary to go into any argument against a doctrine which is a totally new doctrine, for the first time propounded by a most learned and ingenious Judge, with whom, upon this occasion however, I differ *toto cœlo*. That learned Judge says, that no prohibitory clause is necessary—that irritant and resolutive clauses are sufficient. I totally dissent from that; I hold the prohibitory clause to be absolutely necessary; and I believe this to be the very first time that such a doctrine has ever been held in the Parliament House, or as we should say, in Westminster Hall.

The Lord Ordinary, and afterwards the learned Judges of the First Division, sustained the defences in both actions, and held the clauses, both prohibitory, irritant, and resolutive, to be effectual. This interlocutor now stands, after full argument, for judgment before your Lordships.

First, the objection taken to the resolutive clause, is very clearly untenable. It is said, that by the frame of the deed there is a difference established and preserved throughout between these two things, "conditions and provisions," and "restrictions and "limitations," *conditions and provisions* being one of the things, and *restrictions and limitations* being the other; that by the former expression the framer of the instruments intended certain things commanded to be done, such as taking the name and arms, and possessing under the entail; that by the latter expression the framer of the entail intended certain other things for-

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bidden to be done, as selling, burthening, and altering the order of succession; that selling, burthening, and altering the order of succession, are only mentioned as restrictions and limitations, and not as provisions or conditions; that the resolutive clause generally refers to conditions and provisions, and says nothing of restrictions or limitations, and therefore the resolutive clause is not levelled (which is just as necessary of course as the other) at anything but the non-compliance with the positive directions, (that is, what they call the positive provisions and conditions,) as to taking the name and arms, and possessing under the entail, but does not strike at the restrictions and limitations, as sale, debt, and changing the order of succession.

There is the most manifest fallacy in this argument. It is dispelled by merely reading the deed. The word "limitations" is expressly employed under the provisions, and those provisions are expressly called limitations. Now, if the argument fails as to limitations, it fails as to both. In the second proviso it is said, "under "the said conditions, *limitations*, provisions, and irritancies *before* " and after mentioned," there being none of what the appellant calls limitations before mentioned, but only the proviso of taking the name and arms. But this is a trifle. What follows is clear, independently of the obvious remark that *condition* is a word neither used to describe things commanded nor things forbidden, and which clearly shows the futility of the notion that each word is to be taken as employed in one sense exclusively.

Another proof of the same looseness of expression occurs in the clause respecting debt. It is stated, as a restriction and limitation, that the land shall not be affected or burthened by any debt which the heirs of entail may contract. Again, in this clause are these words, which at once show how promiscuously the two kinds of expression are used, "and with this restriction " and limitation also, as it is hereby expressly conditioned, and " provided that the lands be not burthened." If the makers of the deed had designed to exclude prospectively all such arguments

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as the present, could they have done so much more effectually than by thus using *conditions and provisions* as synonymous with restrictions and limitations?

Next, the resolutive clause is itself called a provision. It begins with these words, "It is expressly *provided* and declared." In truth, provide and provision are words, both in legislative enactments and in the framing of deeds, of the largest extent and import; they cover every thing that can be enacted in a statute, or enumerated in a deed. Then the resolutive clause proceeds to show how indiscriminately and interchangeably the words are employed. It says, "In case they shall contravene any of the "before-written conditions, provisions, limitations, and restric- "tions, that is, shall fail to perform the *haill* conditions and "provisions above set down," (observe *conditions* was not the word used under the head of things commanded, but only provisions,) "or any *other* after conditions and restrictions," not "limi- "tations and restrictions," but "conditions and restrictions that "may be added." Here *restrictions* as well as *conditions* are used by force of the word *other* in the sense of provisions; but it still goes on, "then the person failing to obey the conditions," (leaving out provisions) "or acting contrary to," what? The provisions? No such thing, but acting contrary to the *above limitations and restrictions*, shall forfeit. Surely this is as plain a forfeiture denounced against all who contravene the *restrictions* and *limitations*, as words can make it. It shows both the interchangeable use of these words, "conditions and provisions," and "restrictions and limitations;" and also that in whatever sense they be taken in the irritant part, the leaning of the clause revokes the right of all who contravene restrictions and limitations. There can therefore no doubt at all rest upon the efficacy of the resolutive clause.

Secondly, We come now to the irritant clause, which may be admitted not to be so entirely free from ambiguity; and the ambiguity, whatever it is, must be ascribed entirely to the verbosity

and redundancy of the language used. But through the mist thus raised, it is manifest that one meaning, and one only, can be gathered, and that without doing violence to the words used. No other construction can be imposed upon them but one, which makes the nullity be declared of all sales, alienations, and altering the order of succession, as well as all burthenings with debts. Therefore that clause begins very largely indeed, and had the subsequent words been kept on the same large scale, there could have been no doubt whatever about it. "Upon any contraven- "tion, or through the heirs" failing to obey and perform all and each of the before-mentioned conditions, or acting contrary to all or any of the restrictions above written; not only the lands shall not be burthened or liable to the *debts*, *deeds*, *crimes*, or *acts* of the heirs so contravening, (now this would not have been quite enough, but it goes on,) "also all debts, *deeds*, or *acts contracted*, "*granted*, *done*, or *committed* contrary to the above conditions and "restrictions, shall be null and void." Observe there is no reference used here, as in the case of Lang *v.* Lang, and the Overton case, to the other things formerly enumerated. On the contrary, the limb of the clause following the words *but also*, is plainly an extension of the limb of the clause following the words *not only*, and preceding the words *but also*, for that is the meaning of the words. When I say I not only do so and so, but also do so and so, the force of the adverb is to extend by the second, what I have done by the first. First, the clause makes null and void, as to burthening the estate, all debts and deeds of contravention; then it goes further, and extends the nullity to all debts, deeds, and acts, contracted, granted, or done contrary to the above conditions and restrictions. Take this in conjunction with the introductory part of the clause, which, as a kind of preamble, sets forth the subject matter that is about to be dealt with "upon "every contravention, or failing to obey, or *acting contrary* to all "or any of *the above restrictions*." We never can doubt that the irritancy strikes much higher than to debts or acts burthening

the estate, it strikes at all deeds granted, or acts done, contrary to the above conditions and restrictions.

There is nothing in any of the authorities cited which impeaches this conclusion, or which a decree pronounced in conformity with it will in any way impeach. Reliance is placed upon Lang *v.* Lang, but it must be recollected that that case depended upon the reference distinctly made to acts or deeds burthening the estate. Counsel are constantly quoting what I said in Lang *v.* Lang. What I said there, as plain as words could speak it, turned upon the word "such," used in that case; nobody can entertain the least doubt about it, because when you refer to all *such* acts, it is a totally different thing, but here it says, "all acts" whatever, without saying *such*. I shall really abstain from reading that part of my argument.

Thirdly, The prohibitory clause appears quite sufficient. It can never be contended that a prohibition to contract debt on the lands entailed, is not effectual, because it extends not to all contracting of debt. In the Newhall case, Mackenzie *v.* Mackenzie, the heirs of entail were prohibited to sell, wadsett, or impignorate the lands entailed, or to *contract debts thereon*, that is, the lands entailed, and this was held to strike at a diligence against the lands for a personal debt. This case, if disputed as it has been, was followed by the recent decision in the Aboyne case, and your Lordships are in that case disposed, I am quite sure, to deny all weight to the objection. It is to be observed, too, that in Murray *v.* Murray, a similar argument was attempted to be used on the qualifying words which we disposed of yesterday, and which, therefore, I need not further recur to. The interlocutors must, therefore, be affirmed, and with the costs of the appeals.

LORD CAMPBELL.—My Lords, I heard these cases, and I entirely concur in the view taken of them by my two noble and learned friends. I think it would be better, instead of my saying anything upon them at present, that I should reserve my general

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view upon such clauses, till the Aboyne case is called, upon which I have prepared a judgment. (See *supra*, p. 289,)

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the Interlocutors therein complained of be affirmed with costs.

SPOTTISWOODE and ROBERTSON—G. and T. W. WEBSTER, Agents.

[Heard *25th July*, 1843. Judgment, *5th September*, 1844.]

HUGH ROSS, of Cromarty, Esq., *Appellant.*

HIS GRACE GEORGE GRANVILLE, DUKE AND EARL OF SUTHERLAND, *Respondent.*

Salmon Fishing.—Held that the prohibitions of the statutes in regard to the use of stake nets, is not limited to the space between where the sea reaches at highest flood, and where it reaches at lowest ebb, as an inflexible rule, but that the space is in each case to be ascertained by evidence of the character of the waters, as contrasted with the terms used in the statutes.

THE respondent was proprietor of lands lying on the water or kyle of Dornoch, and of lands lying on the River Shinn, which falls into the Water of Dornoch, and he was also proprietor of extensive salmon fishings, *ex adverso* of his lands. The appellant, on the other hand, was proprietor of the lands of Cambuscurry and Tarlogie, also lying on the Water of Dornoch, "cum lie "zair et salmonum piscationibus earundem." Some of the lands were described in his titles as bounded "mare ex boreali," and others were granted with the power of fishing "in mare marisque "littore seu acquis infra et prope bondas dict terrarum."

The Water of Dornoch, at the height of flood tide, presents the appearance of an extensive estuary, or branch of the sea stretching many miles up the country, into which the River Oykell discharges itself. The influence of the tide at high water of the highest spring tide, in retarding the waters of the River Oykell, is felt as far up that river as a point called Castle Nekore. The lowest ebb of the spring tide is, on the other hand, at a point called Quarry Rock, about thirteen miles below Castle Nekore. Between these two points four streams discharge their waters. At ebb tide, the breadth of water a little above Quarry Rock, and

all below it, is very much contracted, extensive tracts of land on either side being left uncovered by water. At the full of flood, if the line of coast, as it trends from the north, were continued straight southwards, the mouth of the estuary, taking it at this line, would be of considerable breadth, but when the tide retires, and the land is thus left bare, the mouth of the estuary, taking it at the line before mentioned, is comparatively narrow, the land forming distinct *fauces;* this is at a point called Gizzen Briggs. Within that point, even at low tide, the water opens up in breadth to a considerable extent in some places, though, in most, it is much narrower than at flood tide.

The appellant, in the year 1841, set about fixing stake-nets in the Water of Dornoch, at a point called Meikle Ferry, about eight miles below Quarry Rock. The respondent complained of this proceeding, by suspension and interdict, on the ground that the nets were being placed within an estuary, or river, and within the limits prohibited by the statutes, in regard to salmon fishing.

The appellant pleaded in answer as follows:—

"I. According to the true construction and effect of the "ancient statutes, founded on by the suspender, the prohibitions "thereof cannot be held to operate lower down than the point or "line where the fresh waters, descending from the upper streams, "meet the salt water of the sea in the Frith of Dornoch, at the "lowest point of ebb tide, below which line, stake-nets and all "other engines being in the sea are lawful.

"II. The stake-nets in question being situated below the said "line in the Frith of Dornoch, are in the sea, and therefore not "struck at by any of the statutory prohibitions; and the sus-"pender not having averred that the same are above the said line, "has not stated any relevant ground of suspension and interdict.

"III. *Separatim.* Under the terms of the respondent's titles, "and having regard to the circumstances and evidence before "averred and set forth, he is entitled to erect and use yairs, stake-

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" nets, or other fixed machinery, for the catching and killing of " salmon in the Frith of Dornoch, opposite to his lands before " specified, in respect that the said frith is not a locality to which " the prohibitions of the statutes against fixed machinery, are in " any way applicable."

The cause was remitted for trial by jury, upon an issue framed in these terms. Whether the defender has wrongfully " fished for salmon opposite to his lands of Cambuscurry, Tarlogie, " and others, in the year 1841 and 1842, or either of them, by " means of stake-nets, or other fixed machinery, placed in a situ- " ation or situations prohibited by statute."

Evidence was led by both parties, to shew what was the nature of the water within Gizzen Briggs, whether sea proper, or river and estuary. That for the appellant went to shew that from the nature of the bottom, and the deposits on it, the animals and vegetable substances found, and the specific gravity of the water, the sea proper extended above Meikle Ferry; while the evidence for the respondent went to establish, from the same circumstances, that the sea proper ended at Gizzen Briggs. No evidence was led on either side as to the effect of the statements in question upon the salmon or their fry.

The Judge at the trial charged the jury in these terms. " The " defender contends, that according to the legal construction of " the statutes referred to in the issue, the only range of space, or " of water to which their terms can be applicable, is the space " between the point to which the sea flows at flood tide, and the " point to which, in any particular water, the tide recedes at low " water in lowest spring tide,—where low water turns in short,— " that the limit described in the statutes extends no farther sea- " ward than the point to which the tide withdraws itself at lowest " ebb tide. That all the water in the estuary, or frith below this " point, wherever that may be, in any particular frith or estuary, " is, according to the sound construction of the terms of the sta- " tute, exempted from the prohibitions, and is sea under these

" statutes, whether other facts would lead the Jury to hold the " place to be in the sea or not. That this is the test, and the " only test for deciding in all cases, whether stake-nets are in " places prohibited by the statute, without reference to, or even " in opposition to, all other facts which might lead to the conclu- " sion that the place where they are situated is not, in point of " fact, the sea, and has no character whatever of a sea coast: " and that, if it is ascertained that the stake-nets are placed in " any particular water below this point, this test is to decide the " question embraced in the issue, and the stake-nets must in law " be held to be out of the operation of the statutes, and in the sea " in the sense of the statutes.

" I am not able to sanction that proposition, or to put on " the statutes the construction contended for by the defender. I " hold that the decisions of the Court have fixed, that the question " to be tried is one to be decided upon all the facts which can be " collected in each case, in order to satisfy the Court or the Jury, " (whichever has to decide the point,) whether the position of the " stake-nets is, in point of fact, in the sea proper, contradistin- " guished from the space described in the statutes; and that the " question, what is the sea and the sea coast, and so not within " the statutes, is an enquiry of fact on the whole case, and not one " to be decided according to any legal view which is to be taken " of what is sea by the force of any one test afforded by the " statutes: and I hold that it is competent and necessary to " attend to all the evidence which can satisfy the Jury, on the " other hand, that the position of the stake-nets is not within the " sea, or on sea coast, but, in point of fact, in waters, or on sands " by the sides of water, in which, according to the real facts of " each case, the sea ebbs and flows, or fills and ebbs. I hold that " the Court or Jury are at liberty, and bound to look to every " fact which can satisfy them, whether the place is really within " the sea, according to the common apprehension of mankind, and " according to all the appearances, facts, and observations,

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" results which can be collected on that point, or whether the " place is within a water fresh or salt, in which the sea fills and " ebbs—comes and gangs. I think that this is the clear result of " previous decisions, and I think it is the legal and sound con- " struction of the statutes.

" Hence then, when the defender pleads to me that in point " of law I must direct you that there is one test, which is in " every case to decide how far up the sea goes, without reference " to any other fact, viz., to the point at which at low water the " flow of the tide in each estuary turns, I am bound in duty to " tell you that such is not the test under these statutes, and that " such construction would exclude in most cases, the greater " portion of the space comprehended within the legal meaning of " the statutes."

The appellant excepted to this charge, and maintained that the Judge should have laid down to the Jury that, " according to " the true construction and effect of the statutes referred to, the " prohibitions thereof cannot be held to operate lower down than " the point or line where the fresh waters descending from the " upper streams, meet the salt water of the sea in the said frith, " at the lowest ebb tide, below which line stake-nets, and all " other engines being in the sea, are lawful."

The Jury returned a verdict for the pursuer (*respondent*), with power to the Court to enter up the verdict for the defender (*appellant*) if the direction excepted to should be found to be wrong.

The Court, (*2nd division*,) by an interlocutor of 9th February, 1843, disallowed the Bill of Exceptions. The appeal was against this interlocutor.

The statutes to which the appellant referred in his pleas in law, and in his Bill of Exceptions, are various. The first is 1318, cap. 12, which ordains that all those who have " croas vel pisca- " rias, vel stagna, aut molendina, in aquis ubi ascendit mare et " se retrahit, et ubi salmunculi vel smolti seu fria alterius generis

" piscium maris vel aquæ dulcis, descendunt et ascendunt," shall make these machines of prescribed dimensions.

The next statute is 1424, cap. 12, which ordains that all crufis shall be destroyed for three years, and that those who have " crufis in freshe wateris," shall keep the law anent Saturday slop.

The Act 1427, cap. 6, continues the statute for destroying " crufis in waters that fills and ebbs" for three years.

The Act 1469, cap. 13, "For the multiplication of fish " salmond," &c., which are said to be destroyed by " coupes" and other engines mentioned as being set within "the flude marke " of the sea," directs that all these engines shall be destroyed.

The Act 1488, cap. 16, ordains that all "cruffis and fisch " dammys that ar within salt waterys quhar the sey ebbis and " flowis," shall be destroyed.

The Act 1563, cap. 3, ratifies the Act of James I., 1424, cap. 12, with this addition, " That all cruves and zaires that are " set of late upon sand and schaulds, far within the water, quhair " they were not of before, that they bee incontinente tane down " and put away, and the remanent cruves that ar set and put " upon the water sandes, to stand still quhil the first day of " October nixt-to-cum, and incontinent after the said first day to " be destroyed and put away for ever."

The Act 1685, cap. 24, enacts that "no man set vessels, &c. " or any other engine to hinder smolts from going to the sea, and " that coupes, &c., set on waters that has course to the sea, be " destroyed."

Mr. Solicitor General and *Mr. Pemberton Leigh*, for the appellant.—The great object of the Legislature in the different statutes, was not the protection of the upper heritors against the lower monopolising the fish, but the protection of the salmon fry, and allowing them free passage between the fresh and salt water, for the increase of the fishing generally. To make the statutes apply, therefore, it must be shown that this object will be defeated

by the erection complained of. If the fry would be intercepted by the stake-nets of the appellant, this would go far to shew that the nets were within the prohibited limit, and this would be an important element for the consideration of the Jury, in determining what under the statutes were the limits; but this consideration was altogether withheld from the Jury by the presiding Judge.

Upon the terms of the statute, it is evident from the nature of the machines mentioned in the Act 1318, cap. 12, that it could not have been intended to prohibit their use in the sea or estuaries, as their form is not capable of being used in either, but only in rivers. This is further shewn by the terms "*acquis*," being used as contradistinguished from "*mare*." The prohibition, moreover, is extended to places "ubi salmunculi," &c., "descen- "dunt et ascendunt," and the object is "*ita quod nulla fria piscium* "*impediatur ascendendo vel descendendo secundum quod libere pos-* "*sint ascendere et descendere ubique*," and it is well known that the term ascending and descending of salmon fry is applicable only to their movements while in fresh waters. The limits therefore to which the prohibition of this statute is intended to apply, are those parts of rivers affected by the flowing and receding of the tide, their upper parts, where the influence of the tide is not felt, being excluded on the one hand, and on the other hand all below or beyond the lowest ebb tide, being equally excluded, as beyond that the sea never "se retrahit." If these limits be adopted, as those intended by the statute, they are easily ascertained in every case. If they are not, then each case must depend upon its own circumstances, and no sure rule can be laid down by which the application of the statute can be ascertained.

The Act 1424, cap. 12, evidently refers to the Act 1318, cap. 12, and by the expressions, "fresche wateris quhar the see fillis "and ebbis," cannot possibly refer to the sea, or to any thing but estuaries, or that part of rivers where the sea ascends, and afterwards retires.

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The Act 1469, cap. 13, prohibits the use of certain engines in "rivers that has course to the sea, or within the flude mark of "the sea," which latter words were, in the Kintore case, 4 *S.* & *D.* 641, held not to apply to the open coast, but to the point to which the tide flows within rivers. This statute therefore shews that the prohibition of the Legislature was not extended to sea proper.

The Act 1477, cap. 6, applies only to cruives, which in their construction are quite distinct from stake-nets; that Act therefore cannot have application.

With regard to the Act 1488, cap. 16, as the engine, the use of which is there prohibited, cannot be used in a position below the low-water mark, inasmuch as a mound right across is necessary it is evident that it also is not applicable, and that the words salt waters, where the sea ebbs and flows, were used merely to distinguish between the upper parts where the tide has no influence, and the lower parts where it has influence.

The Act 1563, cap. 3, in using the terms "salt waters that ebbs and flows," leaves the matter just where it was, as was held in the Kintore case; for these words, if construed strictly, would embrace the whole sea, whereas the intention seems, but for a clerical error in transcribing the Act 1488, to have been to adopt the terms there used, "salt waters, where the sea ebbs and flows."

The Act 1685, cap. 24, does not prohibit any thing being done *in* the sea, but in waters that have course *to* the sea.

But even if the interpretation contended for by the appellant is not the correct one, still the charge of the Judge is liable to exception, inasmuch as it not only does not lay down any fixed definite rule by which the Jury could be guided, but is calculated to mislead them by using expressions as to the sea "coming and "ganging," which were not in the statutes, and by using other words which by plain inference excluded from their consideration any idea of the necessary proximity or influence of a river, and

would embrace every bay, loch, or frith, by which any part of the coast of Scotland is indented.

Not only is the position maintained by the appellant supported by reason and expediency, but it is also borne out by the authority of decided cases. In Moray *v.* Gordon, mentioned by Lord Kaimes, in reporting the case of Straiton *v.* Fullerton, which is in *Mor.* 12,797, it was held that the *ostium fluminis* comprehended the space between the lowest ebb and the highest flood mark; in other words, that the boundary between sea and river was the line of the lowest ebb. In Kintore *v.* Forbes, 3 *W.* & *Sh.*, 265, it was held that the prohibitions of the statutes did not apply to the sea coast, but were applicable "to rivers, "and to rivers only, and to continuations of rivers;" and in Horne *v.* Mackenzie, *McL.* & *Rob.* 977, the Lord Chancellor, (*Cottenham*,) at reversing the judgment of the Court below, distinctly, and in terms laid down, that the waters mentioned in the Statute 1318, were distinct from the sea, and must "also be above "the level of the sea, at least at low water," so that the sea might be said *to rise* in them, and the fish leaving the sea *to ascend.*

In the Tay case, the decision of the Court proceeded upon the fact of the titles of the parties speaking of the river as far down as the Drumly Sands, and of the Act 1581, cap. 15, speaking of the Tay as a river as far down as the town of Dundee. In the present case, the titles of the parties speak of the water in contest as being sea—the lands are described as bounded by the sea. Another element in the Tay case, was the absence of yairs within the limits in question, whereas in the present case yairs have been in use from time immemorial, within the water of Dornoch. In short, that case was decided entirely upon its own specialties, and did not establish any general principle. Indeed, it is all but doubtful whether the point of lowest ebb now contended for, was raised and brought before the attention of the Court.

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Mr. Kelly and *Mr. Hope*, for the Respondent.—If the point at which the prohibited localities terminate, is to be taken as at where the waters of the river meet those of the sea at lowest ebb, that is a point certainly which, though not obvious to the senses, can be ascertained by the efforts of modern science; but the means for ascertaining it were not known at the time at which the statutes were enacted, it could not therefore have been in the contemplation of the Legislature; though always existing as a matter of fact, as a matter of knowledge it did not exist until modern times. If this point were adopted, it would in practice very much limit, in most instances, the space over which the protection of the statutes could extend, and would produce serious effects upon salmon fishing generally, especially in those cases where a sudden rise should occur in the level of the bed above the point suggested. But it is evident, from a due construction of the statutes, that no such limit is fixed by them.

The Act 1318 does not refer to proper fresh water rivers, because it speaks of the sea ascending and descending; and as little does it refer to sea proper, because the sea does not flow into waters, but upon the coast. The description refers then to localities where there is both sea and river: estuaries where both exist, answer the description, and the mention of ebbing and flowing of the tide was not intended to mark the portion of each particular estuary, but the character of the waters in which the engines prohibited were not to be used. This is shown more distinctly by what is said about the fry of salmon and other fish descending and ascending; for the fry of salmon never ascend, but descend from the fresh to the salt water, and the fry of other fish never ascend beyond those parts where the fresh waters are strongly impregnated with the salt.

With regard to the Statute 1424, cap. 11, the record of which has been lost, it seems almost certain the word "fresche" before "wateris quhair the sea fillis and ebbis," was either put by mistake in the original, or is an interpolation in copying, as is evident

from the subsequent mention of "fresche wateris," which are put in direct opposition to those "quhair the sea fillis and ebbis."

This is shown more distinctly by the Act 1427, cap. 6, which continued the operation of the Act 1424, and in which the word "fresche" does not occur. There the expression is "watteris "that fillis and ebbis," which is quite irreconcileable with the notion that the part designated is confined to that affected above the line at the lowest ebb.

Again, the Act 1469, cap. 13, made perpetual by the Act 1581, prohibits the engines mentioned in it in "rivers that has "course to the sea, or within the flude marke of the sea." This certainly is not applicable to the upper parts of streams, which never have been held to be included; but with the exception of these, it is plainly applicable to every other part of a river's course, embracing every point between river proper and sea proper, every point from which the salt water is never absent even at lowest ebb, but where, nevertheless, the river can be traced working its way to the ocean.

Again, the provisions of the Act 1488, cap. 16, are directed to "salt waterys quhar the sey ebbis and flowis." Here salt waters cannot be supposed to be the sea: they evidently mean an estuary of a river, from the mouth of the estuary on the general line of the coast where the sea enters at flood tide, and covers the banks and sands on either side, for the time obliterating the features of the channel.

The expressions in the Act 1563, cap. 3, by the introduction, "sand and schauldis far within the water," and "water sandes," describe still more distinctly what in modern language is known by the single word "estuary;" they evidently imply great breadth and space of water. In this statute, as in a previous one, 1429, "the waters of Solway" are excepted; but there is no river of this name that can come under the term waters; there is only a large estuary, receiving into it a number of rivers. If, therefore, the statute applied to rivers only, this exception of the Solway

would have been unnecessary, as it would not, from its character, have come within the prohibition.

The Court below, therefore, was right, upon the terms of the statute, in holding that the Judge at the trial had correctly laid down that there was no inflexible rule such as that of where the point of lowest ebb can be ascertained, and their judgment is moreover supported by the decided cases. In Kinnoul v. Hunter, *Mor.* 14,301, stake-nets were prohibited at a point very far below the lowest ebb, as was ascertained by the subsequent inquiries in Atholl v. Maule, 5 *Dow.*, 292. In that case, (the Tay case,) "the highest point at which the sea is continually ebbing and "flowing," was minutely ascertained by the engineers employed, and recommended to the consideration of the Court. That point was stated to be the confluence of the Earn with the Tay; but the Court disregarded it, and extended the prohibition down as far as the east or seaward end of the Drumly Sands, many miles below the point. This was a judgment that the prohibitions of the statutes extended to estuaries and friths forming the continuation of rivers; and it has always been regarded as laying down the general law, and not as confined to its own *species facti*. In Carnegie v. Ross, 7 *S.* & *D.*, 284, the point of lowest ebb was never suggested, although in a previous case, in 1812, Carnegie v. Dunn, *N. R.*, in regard to the same fishings, that point had been ascertained to be far above the one in question in the case.

The position contended for is, that the prohibitions apply between the highest point to which the sea reaches at flood, and the highest point to which it reaches at lowest ebb; but at ebb tide the whole body of water between these two points is quite fresh; how can that answer then the words of the statute, "*salt* "waters, where the sea ebbs and flows."

As to the Cromarty case, it did not in any way overule or run counter to the Tay case. The judgment left the general law untouched, and was entirely addressed to the particular terms of the Judge's charge.

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The other authorities referred to by the respondent, were Fraser *v.* Duff, 5 *Sh.* & *D.* 14; Kintore *v.* Forbes, 4 *Sh.* & *D.* 641; McWhirr *v.* Oswald, 1 *Sh.* & *M'L.* 393.

LORD CHANCELLOR.—My Lords, at the trial of this cause, three exceptions were taken to the charge of the learned Judge. The two last only have come by appeal to your Lordships.

Of these, the first is, that the learned Judge should have directed the Jury that the prohibitions in the statutes do not apply to that part of the channel which is below the point where the fresh water meets the salt water at the lowest ebb tide. This is the main question for your Lordships' decision. The river Oykell flows into an estuary bounded by banks on each side, until it reaches the open sea. It has been decided that the prohibitions of the statutes do not apply to the open sea, or its shores. It is contended, on the part of the appellant, that in cases like the present, the limit beyond which the prohibition does not extend, is the point of lowest ebb of the salt water, beyond which the sea never entirely recedes, that from this point upwards to the line of highest flood the sea flows and reflows, mingling with the fresh water during the flood, and leaving it entirely at the extreme ebb. This boundary is in some cases apparent to the eye; in all cases it may be ascertained by a proper application of science. In order to determine the correctness of this position, it will be necessary to refer to the statutes and to the decisions upon them.

The first statute is that of Robert I. It regulates the construction of machines in waters where the sea flows and reflows, —"*ubi ascendit mare et se retrahit, et ubi salmunculi vel smolti* "*seu fria alterius generis piscium maris vel aquæ dulcis descen-* "*dunt et ascendunt,*" so that the fry shall not be impeded in their ascent or descent. The words of this statute have been made the subject on both sides of much refined criticism. There is nothing in this statute to confine the meaning of the word "waters" to

fresh waters, and the expression "*ubi mare ascendit et se retrahit*," means, I think only where the sea flows, and reflows, and in fact those are the very words of the rubric. The argument built on the words, "se retrahit," is, I think, too refined; the sea which ascends, does withdraw itself, although that portion which is permanent and stationary, does not. The passage relating to the fry of the fresh and salt water fish ascending and descending, would rather lead to the more extended construction.

The subsequent Acts are Acts of prohibition. The first is James I., chap. 12 (1424). By this Act all *crufis* and *yaris* set in fresh waters, where the sea fills and ebbs, which destroy the fry of all fish, are ordered to be destroyed and put away for three years to come, and they that have *crufis* in fresh waters, are warned to keep the laws of the Saturday slop, and not to suffer them to stand in the forbidden time.

The next Act, James I., chap. 6, continues the former Act for three years, omitting the word "fresh," in the description of the waters where the sea fills and ebbs, but adding words of reference "in form and effect, as was statute in the first Parliament." It is supposed by the appellant, that the word "fresh," in the Act of 1424, is a mistake in the copy, (the original has been lost,) and that word being omitted in the continuing Act, affords some ground for the conjecture, though the words of reference in the continuing Act, might have been thought to render the repetition of that word unnecessary.

The next material statute is that of James III., chap. 13 (1469). It is in these terms,—"For the multiplication of fish," &c., "which are destroyed by cowpers, narrow masses, nets, and "prynes, set into rivers that has course to the sea, or set within "the flude mark of the sea," it is ordered that they "be destroyed "and put away for three years." To this Act there is no downward limit. "In rivers that have their course to the sea," include the whole course of the river, and the words "or set within the "flood mark of the sea," would, I think, comprehend the whole space from high water mark to the open sea.

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This Act was followed by the Statute of James III. (1477), chap. 6, which re-enacts the Statute of 1424, almost in the same terms, omitting the word "fresh," as in the Act of 1427.

The Statute of James IV. (1488) is deserving of notice. It is as follows:—"It is statute and ordained that all crufis and fish "dams that are within salt waters where the sea ebbs and flows, "be absolutely destroyed and put down, as well they belonging to "our Sovereign Lord, as others through all the realm. And as "anent the cruffis in fresh waters, that they be made of sic largi- "ness, and sic days keepit, as is contained in" former statutes. It is impossible, I think, to exclude from this description, viz., the "salt waters where the sea ebbs and flows," much of what lies below the line contended for by the appellant.

The subsequent Statute of Mary (1563) leads to the same conclusion. After confirming the Act of James IV., it proceeds to direct "that all cruves and zaires that are set of late upon sand "and shoals far within the water where there were none before, "be taken down and put away, and the remaining cruves that "are set, and put upon the water-sands, stand still till the "first day of October next, and then be destroyed and put away "for ever." This description would not, I think, apply to the river above the suggested line, but it is distinctly applicable to the estuary between that line and the sea.

There is a provision in this Act, as in a former one, that it shall not extend to the cruves and zaires being upon the water of Solway. The water of Solway is an estuary, and from these provisions we must assume that the Scottish Parliament considered that, without this exception, the Act would have extended to that estuary. It seems to follow, therefore, that they meant to include that description of water in their legislation.

This brings me to the consideration of the authorities. The brief notice of the statute by the institutional writers of Scotland, does not, I think, throw any material light upon the question now in controversy. I shall proceed therefore at once

to consider the cases which have come under review in this discussion.

The most important in every respect is the Tay case, which was decided in the Court of Session, and afterwards affirmed on appeal in this House. In that case, a report was drawn up by Mr. Jardine, the object of which was to ascertain the point at and below which the tide continually ebbs and flows, in other words, the place of the lowest ebb tide. The report was commended and adopted by Professor Playfair, as the best criterion for determining where the frith ends, and the river begins. It was contended that the prohibition did not extend below that point. This opinion was adopted by one of the learned Judges, Lord Gillies. "My own impression," he says, "is that the "statutes do not apply either to the sea or to the frith, and that "the river ends at the place pointed out by Mr. Jardine." If the question had been, whether this line was in strictness, and philosophically speaking, the boundary between the river and the frith, there would be little doubt that Mr. Jardine was right, and if the Legislature intended so to confine the prohibition, the learned Judge came to the proper conclusion. But the rest of the Court did not consider this to be the true meaning of the statutes, and forming their opinion upon the whole of the evidence, they determined that the defenders had no right to place their machinery within the high water mark opposite to lands bounded by the river, frith, or water of Tay, as far down as Drumly Sands, a point far below the line so assigned by Mr. Jardine for the common boundary of the frith and river. There was no dispute as to the accuracy of Mr. Jardine's conclusion, but the Court did not consider it as the test by which the application of the statutes was to be directed. When the case came before your Lordships, the same argument was raised, but with the same result. The decision of the Court of Session was affirmed, with permission to inquire whether the river, frith, or water of Tay, did not extend further eastward than Drumly Sands.

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After this decision, I do not see how it can be contended that the learned Judge ought to have directed the Jury, that, according to the true construction of the statutes, the prohibitions thereof cannot be held to operate lower down than the line suggested. This would be to reverse the decision in the Tay case, in which it was held that the prohibition might have such an operation. If the rule were such as is contended for, all the rest of the evidence after the establishment of the position of this line, would have been wholly immaterial.

The Tay case was followed by that of Cromarty. The same question was raised upon the Bill of Exceptions, and decided by the Court unanimously, in conformity with the decision in the Tay case. On the appeal to this House, the interlocutor of the Court of Session was reversed, but upon grounds not affecting the present question.

With respect to the case of the Earl of Moray *v.* The Duke of Gordon, it does not appear to me to have a very close application to the present question. The Duke had a right of fishing *in ostio fluminis de Spey*. The Earl of Moray had the upper fishings of the river. The question was as to the upward point to which the Duke's right extended. The Court of Session decided that his right varied with the state of the tide,—that it extended to the point at which the river runs into the sea at whatever time of the tide. The House of Lords reversed this decision, and adjudged the Duke of Gordon's right to extend from the place where the line which the sea makes upon the coast cuts the river at high water down to the sea. The judgment fixes only the upward boundary of what is called the *ostium*. This was all which it was necessary to decide, as between the parties to that suit.

I do not lay much stress upon the argument that the mode of determining the boundary of rivers is a recent discovery, and requires considerable science in the application of it. If the Legislature intended to confine the prohibition strictly to rivers,

it is no objection to such an interpretation, to say that they could not with accuracy define the limits of what, under particular circumstances, constituted a river, and that a greater degree of precision has been attained by the aid of modern and more advanced science. The rule would be applied according to its more truly defined limits. I submit to your Lordships, therefore, that the first exception cannot be maintained.

Then as to the second exception, the substance of the charge is this. The Jury are to enquire whether the place in question is in the sea properly so called, and in the usual acceptation of the term, or whether it is in a water, whether fresh or salt, in which the sea ebbs and flows, and as to this, they are to form their conclusion from all the facts in evidence before them. It is an enquiry of fact upon the whole case. If the prohibition is not confined to what may be considered in strictness the river, and if it does not apply to the sea coast, and the open sea, I do not very well perceive how the learned Judge could have done more. In fact the only ground alleged in support of the exception, is that the same charge would equally apply to a bay, or a loch, or other inlet of the sea where there was no river passing into or through it. But the learned Judge was directing the attention of the Jury to the case before them, of an estuary into which a river poured its waters, and the only material question is, whether he was correct in what he laid down with respect to waters so circumstanced. Had it been the case of a mere bay or inlet, such a charge would have been justly liable to exception.

I would therefore recommend your Lordships to affirm the judgment of the Court of Session.

Lord Cottenham.—My Lords, this case undoubtedly raises a question of very great difficulty, and which has been the subject of long litigation in the Courts of Scotland, and I must say that the mode in which this case was left to the Jury, in my opinion, by no means tends to diminish the probability of future litigation

upon this subject. At the same time, it is, I am aware, extremely difficult to prescribe the mode in which the question ought to be left to the Jury. I have taken into consideration all the cases which have occurred, and from the extreme uncertainty which has resulted from the various decisions that have taken place, I think that the rights of parties interested in fishings in Scotland, will not be upon a satisfactory footing, until that great uncertainty, which arises from the old statutes upon the subject and the decisions which have taken place upon them, has received some little attention from the Legislature. It appears to be impossible to reconcile the decisions and the statutes together, and therefore the law requires amendment in the position in which it now stands.

My Lords, this case comes before us upon two exceptions taken to the direction to the Jury at the trial of the issue. It is sufficient, as it was in the Cromarty case, for the purpose of sending it back to be again tried, if we should be of opinion that the learned Judge was wrong upon either of the points excepted to. If that learned Judge was right in regarding the construction of the statutes suggested by the first exception, but was not right in the construction he put upon them by the part of his address to the Jury embodied in the two exceptions, the verdict cannot stand.

I propose to abstain altogether from discussing the much litigated point raised by the first exception; and shall refer only to what has been decided by this House in Lord Kintore's case in 1828, and in the Spey case in 1752. In the former, the upper heritors claimed an interdict against fixing nets "within "the salt water that ebbs and flows adjoining to the river Don, "or upon the sands or shoals within the said water." In advising the House in this case the present Lord Chancellor observed that Bankton, Erskine, and Lord Stair, in referring to the Acts, did not in any instance apply them to the sea coast, but spoke of the prohibition as applicable to rivers, and to rivers only; and said that the whole body of the Acts taken together

refer, not to the sea coast, but to rivers and continuations of rivers.

In the Spey case, the ultimate result was as has been stated by my noble and learned friend; but it is to be observed in that case, that the claim of the parties to the lower fishings was stated in these terms,—it was between the lowest ebb and the highest flood. The order of this House did not prescribe the lower limits, it only ascertained the higher limits, but the parties did not lay their claim lower down than as is there described, the lowest ebb; they claim between that and the highest flood, which is described in these words, that is, the line which the sea makes upon the coast at high water.

The question now is, did the learned Judge expound the statute to the Jury in a manner consistent with what had been decided in this House, and with the meaning of the statutes themselves? He tells them, indeed, that if the nets are in the sea proper, they are not within the Acts; but he tells them that what is sea proper, as contradistinguished from the space described in the statutes, is to be decided upon all the facts that can be collected in each case, and that the Jury were to look at every fact which could satisfy them whether the place was really within the sea according to the *common apprehension* of mankind, and according to all the appearances, facts, and observations, and results which could be collected on that point, or whether the place was within water fresh or salt, in which the sea fills and ebbs, comes and gangs. He also said, that what is the sea and sea coast within the statutes, is an inquiry of fact on the whole case, and not one to be decided according to any legal view which is to be taken of what is sea by the force of any one test afforded by the statutes.

To this charge to the Jury there appears to me to be two decided objections. First, that the learned Judge abstained from informing the Jury what was in his judgment the legal construction of the statutes; and, secondly, that he misdirected the

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Jury as to the tests by which they were to form their judgment as to what were the waters protected by the statutes.

As to the first, whatever difficulty there may be in putting a satisfactory construction upon the various expressions to be found in the different statutes, it is clear that they intended to protect one description of waters only. In the Kintore case, this House did put a construction upon them, so far as to hold that they applied only to rivers, or continuations of rivers. The only question open, therefore, is, what is a continuation of a river. This, also, seems to have received a definition, so far as such a definition goes, by the claim made by the parties in the Spey case, although it might not have received a decision of this House. Where the continuation of the river ends, the sea proper for this purpose begins, and in giving to the Jury the test by which they are to try the one, they are in fact instructed how to define the other.

What then are the tests by which the Jury were told they were to distinguish between a continuation of the river and the sea proper? First, "The common apprehension of mankind." The statutes certainly intended to lay down some general rule, but the apprehensions of mankind probably would differ in every case of difficulty. How can the rights of property and the construction of Acts of Parliament depend upon the common apprehension of mankind? The apprehensions of Judges upon this subject have been very various. Can it be expected that certainty will be attained by reference in each case to the common apprehension of mankind?

The second test to which the Jury were referred was "ap-"pearances." Now it is clear, that nothing can be so uncertain upon this subject as appearances, varying in different localities without any variation in what is essential to the protection of the fish. Many narrow straits of the sea have the appearances of a river; many rivers are so broad as to have the appearance of the sea. Take some of the sea lochs of Scotland. Can any one

by appearance say whether they are rivers or the sea? The same may be said of the upper part of the Bristol Channel. Into that, and probably into all the sea lochs, rivers empty themselves, but the appearance cannot decide where the rivers end and the sea begins.

The most objectionable part of the charge, however, is the conclusion of the passage excepted to, in which he informs the Jury what are the tests by which they are to judge whether the place in question be within the protection of the statutes, "whether the place is within a water fresh or salt, in which the "the sea fills and ebbs, comes and gangs." Now, suppose these expressions to be found in the statutes, which the latter I believe is not, the law upon the subject is not to be ascertained by any particular expression to be found in some particular statutes, but by a construction to be put upon the whole of them taken together, as was done by this House in the Kintore case. Does the test thus laid down necessarily describe the only waters protected according to that decision, that is, "rivers, or conti-"nuations of rivers?" Is there no place within a salt water in which the sea fills and ebbs, comes and gangs, other than in a river, or a continuation of a river? Is there any bay upon any coast in the open sea, in which there is not salt water, in which the sea fills and ebbs, comes and gangs? Upon this test it is obvious that the Jury may have supposed a place, within the protection of the statute, which was not within the river, or a continuation of it, and therefore not within the definition prescribed by this House in the Kintore case. The description, indeed, is very similar to those used in the Kintore case, and there held to describe places not within the statutes. Whether the Jury were so misled is immaterial; if the address of the learned Judge was calculated to mislead them, it is sufficient to have this case sent to a further inquiry.

My Lords, I have stated the difficulties which have occurred to me, with reference to the cases, and with reference to the

statutes applicable to the language used by the learned Judge, in directing the Jury. I think the expression used, and the tests he afforded to the Jury, were not such as were likely to lead them to a safe conclusion. The majority of my noble and learned friends, I believe, are of a contrary opinion. I certainly lament that it should be laid down by this House, as it will be, if the second exception (I do not speak as to the first) be overruled, that that is a proper mode in which questions of this sort are to be left to a Jury. Beyond all doubt, that will be the form, in future, in which such questions will be left, and that will very much, in my opinion, increase the difficulty which now exists, and add to the uncertainty which already prevails upon this subject, and will therefore, I believe, add to the necessity very much, which I before suggested, that some enactment should be made for the purpose of ascertaining at once what is meant to be protected, and what quarters are not protected.

Lord Campbell.—My Lords, what we may do by legislation I hardly know, as ever since the time of Robert I. attempts have been made by legislation to settle doubts, and every new Act has only created fresh doubts; I, therefore, think that it would be better to abide by judicial decision.

My Lords, in this case I confess that I feel very great difficulty. With respect to the first exception, none at all, for I am clear and decided that the rule contended for by the appellant cannot be supported. It is wholly inconsistent with the decision of this House in the Tay case, and applied to that case would bring the point of junction between sea and river from the Drumley Sands, and carry it many miles up the Tay. That rule, therefore, clearly cannot be insisted upon. But what we are to do with the second exception is certainly much more difficult, and I must own that I have again and again thought that it would be necessary to set aside this verdict, and to have a *venire de novo*. But then, my Lords, in fairness to the learned

Judge, I think we should be bound to tell him what the rule is which he ought to have propounded to the Jury. After the most anxious consideration, I am not prepared to say what that rule ought to have been, and I must, therefore, see whether he has necessarily misdirected the Jury, because, upon a Bill of Exceptions, you must clearly see that the Jury, in giving weight to the direction of the Judge, have been misled. I should be very sorry if this were taken as a model for directing a Jury, in similar cases hereafter. I think that it is not conceived in the most felicitous terms, but I must see whether it contains any misdirections, upon which it necessarily follows that an injustice has been done.

You must take the whole direction together. It is not fair to pick out a particular expression of the learned Judge, but you must suppose that the Jury paid equal attention to all that fell from him, and in looking at the whole, let us see whether they might not have come to a right conclusion without disregarding the directions they received. The words are, "I hold that it is "competent and necessary to attend to all the evidence which "can satisfy the Jury, on the other hand, that the position of the "stake-nets is not within the sea, or on the sea-coast, but in point "of fact, in waters, or on sands by the sides of water, in which, "according to the real facts of each case, the sea ebbs and flows, "or fills and ebbs. I hold that the Court or Jury are at liberty, "and bound to look to every fact which can satisfy them, whether "the place is really within the sea, according to the common "apprehension of mankind." Now I think that was right, they ought to take every fact into consideration. "And according to "all the appearances." If they were to take only "appearances," as my noble and learned friend has suggested, a stranger coming upon Loch Fine, might not be able to tell whether it was a river or an arm of the sea. But that is not all that the learned Judge says. "According to all the appearances, facts, and observations." Now if any one were to come to Loch Fine, and compare it with

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Loch Lomond, they would soon discover that it was an arm of the sea, and not a river. "And the results which can be collected on "that point, or whether the place is within a water, fresh or salt, "in which the sea fills and ebbs, comes and gangs. I think that "this is the clear result of previous decisions, and I think it is "the legal and sound construction of the statutes." Now I cannot say that by these words the Jury have had the best assistance in coming to a right conclusion; but what we are to consider, is whether they have been misdirected, and I cannot see satisfactorily that the law has been misstated.

For these reasons, my Lords, I think that we are not justified in setting aside the verdict, and ordering a new trial, and that therefore the interlocutor appealed from should be affirmed. On account of the difference of opinion among your Lordships, and even without that, seeing that there was a highly probable ground of appeal from the loose manner in which the question was left to the Jury, I should recommend to your Lordships that the interlocutor should be affirmed without costs.

Mr. Robertson.—My Lords, it is necessary to explain the matter with regard to the exceptions. There were three exceptions in this case, and your Lordships' judgment has now proceeded upon the second and third exceptions. The first exception was withdrawn at the Bar, and it will be necessary in the judgment to state that.

Lord Campbell.—Then the whole are now disposed of.

Mr. Robertson.—Precisely so, my Lord, but the judgment affirmed will be sent back upon the first exception to the Court of Session. The Court of Session have directed something to be done upon the first exception, which exception is now withdrawn. I should submit that the judgment will be an affirmance and a remit to the Court of Session.

Lord Cottenham.—The appeal is only as to two exceptions.

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Mr. Robertson.—As to three exceptions, my Lord.

Lord Chancellor.—The appeal is confined distinctly to two exceptions, and the reasons are confined to two exceptions, and all we have disposed of is as to those two exceptions.

Mr. Robertson.—But, my Lord, in the remit to the Court of Session, it may be necessary to take notice that the first exception was withdrawn at the Bar.

Lord Cottenham.—Was the first exception the subject of appeal?

Mr. Robertson.—It was so understood.

Lord Chancellor.—It is quite clear it is not so according to the papers.

Lord Campbell.—I well remember that we refused to hear the cause till the point had been decided by the Court of Session; it was abandoned because we would not conditionally hear the case.

Mr. Robertson.—The first exception was not brought here by appeal, but the House refused to proceed with the two other exceptions till that was withdrawn.

Lord Chancellor.—It is not brought here, and we have nothing at all to do with it. It is distinctly stated in the papers which I have recently read, that the appeal is confined to two exceptions, and we think that there is no foundation for that appeal.

Lord Cottenham.—The first exception certainly was not matter of appeal.

Lord Campbell.—Your doubt, Mr. Robertson, is as to the manner of drawing up the order.

Mr. Robertson.—Exactly, my Lord.

Lord Chancellor.—We will take care that it shall be drawn up properly. It shall be looked to.

Lord Campbell.—Between such gentlemen as are concerned in the case, there can be no difficulty. You will do whatever is right on both sides, I am sure.

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Ordered and adjudged, That the petition and appeal be dismissed this House, and that the said Interlocutor therein complained of, in respect of the said second and third exceptions, be affirmed. And it is further ordered, that the said cause be remitted back to the Court of Session in Scotland, to do further therein, as shall be just, regard being had to the fact, that the first exception was withdrawn by the appellant at the Bar, upon the hearing of the cause as above mentioned.

Richardson and Connell—Spottiswoode and Robertson, Agents.

[Heard 19*th July*. Judgment, 5*th September*, 1844.]

MRS. JANE CARRICK and OTHERS, *Appellants.*

DAVID BUCHANAN and OTHERS, *Respondents.*

Tailzie.—A deed of entail which contained prohibitions embracing acts by the institute by name, and a general irritancy of all acts contracted, granted, or done, in contravention of the prohibitions, without mention of the institute or heirs, followed by a declaration that all debts, deeds, and acts contracted or done in contravention should be ineffectual against "the other heirs of tailzie," was *held* effectual to void a deed, altering the order of succession, made by the institute.

Ibid.—Held that a gratuitous *mortis causa* deed, altering the order of succession prescribed by an entail, is void in a question *inter hæredes*, without regard to the question whether the entail was sufficiently fenced under the Act 1685.

THE terms of the deed of entail out of which this case arose, will be found in vol. i., page 368. When the cause returned to the Court of Session, under the remit there reported, that Court ordered cases upon the questions contained in the remit to be laid before the Judges for their opinions. That question was expressed in these terms:—"Whether, if the irritant clause in the "deed of entail should be held defective, as not being directed "against the institute, the said deed of entail is otherwise suffi- "cient to exclude or render void the disposition under reduction, "on the ground of its being, as alleged by the respondents, a "gratuitous deed."

After reading the cases for the parties, the following opinions were delivered by the Judges:—

"LORD JUSTICE CLERK.—The point involved in the question "stated for the opinion of Her Majesty's Judges in the above "remit from your Lordships is this,—Whether, if the irritant

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" clause in the entail referred to is not directed against the insti-
" tute, a deed of alteration of the order of succession—a gratuitous
" deed—is reducible in respect of a *prohibition* in the deed of
" entail against alteration of the order of succession?—whether,
" in short, a prohibitory clause is of itself sufficient to render void
" a deed altering the order of succession?

" Had this question occurred in the course of any cause in the
" Court of Session, I would not have been disposed to express, if
" other Judges did not concur in, the difficulties which I have
" always entertained on the point, and would have deferred to the
" weight of the opinions expressed by institutional writers, and
" incidentally but frequently by so many Judges of great name
" and authority.

" Called upon specially by the House of Lords to report our
" opinions on the point, I feel that I am bound to state my own
" view, however reluctantly expressed when in opposition to the
" authorities I have alluded to. I cannot assent, however, to
" the statement, that this is a point on which the opinions of
" lawyers have been uniformly settled. Judges of great authority
" in the case of Ascog gave a deliberate sanction to the opinion
" which I entertain, and that opinion is explained in one of
" the most elaborate judgments which Lord Eldon ever pro-
" nounced, which received the deliberate concurrence of Lord
" Lyndhurst.

" In the first place, I am of opinion, that the point has not
" been fixed by any decisions, so to preclude the determination of
" it according to sound principles.

" The case of Callander I cannot regard as authoritative. It
" seems to me, according to Fountainhall's report, to support
" views of the Act 1685 (*e. g.* as if an irritant clause alone was
" effectual against onerous creditors), which undoubtedly cannot
" be acknowledged. It proceeds on the application of the Act
" 1621, which, if a sound ground, would, in my opinion, apply
" against creditors as much as gratuitous disponees. And that

" view of the argument, founded on the Act 1621, was taken by " Lord Eldon in the Ascog case, who said he did not see how " one could stop short in the application of the Act 1621. The " last point decided, viz., as to the impossibility of keeping up " debts affecting an entailed estate, is contrary to many subse- " quent judgments. The case is not satisfactory as reported by " Fountainhall. But further, from Harcarse's report, it is not " clear to me that there was really any prohibition at all, but only " a destination, which is admitted not to be sufficient. It would " rather appear from that report, that the destination had become " the subject of onerous contract between the heir in possession, " and his brother and nephew, which a gratuitous disponee " might be bound to implement, and had been ratified by an " onerous obligation not to alter the entail. Again, there was no " proper deed altering the order of succession, but a bond for a " fictitious debt. And, lastly, the reduction is stated by Har- " carse to be rested specially on an *obligation*, which had been " the subject of contracts. The argument for the pursuer, as " given in *Harcarse*, (*Mor. Dict.* 15,480), seems to show that the " case did not turn on or decide the point now in question.

" The case of Ure *v.* Crawford has no application. The deed " there seems to have been solely a destination. But the in- " stitute *granted a separate deed binding himself* not to grant " any deed whereby the lands might be affected. A question " was raised as to the meaning of that obligation. The judg- " ment of reduction proceeds on the effect of that *obligation* " granted by the party whose deed was challenged—not on the " effect of a tailzie with a prohibitory clause. The points are " manifestly different.

" The only other case referred to as a *decision*, is a branch of " the Roxburghe cause. The defenders have given no detailed " explanation of this branch of the case, and I may be in error " regarding it. But after a careful examination of the report, " and of all the pleadings in this Court and in the House of

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" Lords upon this branch of the cause, and of the opinions of the " Judges of the Court of Session, I cannot find that the point " was raised for decision, or could be decided. The points raised " were, whether the words of the prohibitory clause did include " alteration in the order of succession, and whether all the " branches of the destination were included within the protected " order of succession, if the prohibition did apply to alteration? " But the question never was raised, whether *a simple prohibition* " would be sufficient, and could not be raised, because it was not " disputed that *there were irritant and resolutive clauses* which " *included all the prohibitions, whatever these might be.* How, " then, in such a case, could the question be raised for decision " —whether a prohibition *without* irritant and resolutive clauses, " was sufficient to render void the deed of alteration of the suc- " cession? The Court found, by a subsequent judgment, January " 16, 1808, that Duke William 'held the estates of the duke- " 'dom of Roxburghe under the fetters of a strict entail.' When, " therefore, in the preceding action to reduce the new deed of " entail, the Court found that the entail 'contains an effectual " 'prohibition against altering the order of succession,' and that " the persons called to the succession under the branch of the " destination, beginning with the eldest daughter of Henry Lord " Ker, 'are heirs of entail of the said entail,' they pronounced " this judgment with reference to a deed containing irritant and " resolutive clauses, and the prohibition to alter was brought " at once within the effect of the irritant and resolutive " clauses. This judgment, and the interlocutors upon the " import of the destination to the eldest daughter of Henry " Lord Ker and their heirs-male, went to the House of Lords. " The Lord Chancellor Eldon discussed at great length, on the " 15th, 16th, and 19th June, 1809, the questions as to the " import and effect of the clauses of destination, but thinking the " Court had erred in pronouncing a finding as to the validity of " the entail, until it was ascertained whether any of the compe-

" titors made himself out to be an heir of entail, he delayed " deciding the point on the meaning of the prohibitory clause, " until the points of pedigree and succession were decided. The " interlocutor of the 15th January, 1807, was not upon this point " affirmed until June, 1811.

" In the report of this branch of the case in the Court of " Session, the point embraced in the remit is not mentioned as " having been decided or separately argued. It is true, that in " the pleadings in the Court of Session, there is a great deal of " general argument as to prohibitions; but in almost every sen- " tence the terms employed are 'prohibitions and *limitations*'— " 'prohibitions and *restrictions*,' which make the argument as " much applicable to an entail with irritant and resolutive " clauses, *which* the Roxburghe *entail was*, as to a different " species of entail. When it went to the House of Lords, there " is no reason in support of the judgment founded upon the point " which is now said to have been decided. In giving an account " of the opinions of the Court, respondent's Appeal Case, p. 13, it " is not stated that the Court gave any opinion upon this ques- " tion. The opinions themselves do not turn on this point. " They turn on the question, are the *terms* of the prohibitory " clause sufficient to cover alteration of the order of succession?

" The account of the argument on the prohibitory clause on " page 15 of Sir J. Innes's case, shows that the discussion turned " on the meaning of the clause in which the prohibition against " alteration of the order of succession was stated to be found. In " the argument upon the meaning of the prohibition, I find that " there are quoted some authorities as to the effect of a prohibi- " tion, without irritant and resolutive clauses. These, however, " are very oddly introduced, because the same argument holds the " entail to be complete, with irritant and resolutive clauses: and " it was not disputed that the latter applied to one part of the " prohibitory clause as much as to another, though there was an " argument that neither the prohibition nor the protection

" applied to the detached part of the destination. When Lord " Eldon noticed this point in 1809, he obviously understood that " it was a question under an entail complete in all its clauses, " provided it included alteration of the order of succession. Thus, " in the opinion of the 16th June, 1809, in stating the points, he " mentioned the one which he intended to postpone to be, 'that " 'all the rights of the heirs of tailzie are guarded by clauses, " 'irritant, resolutive, and prohibitory, sufficient to prevent an " 'alteration of the order of succession.' I understand from my " brother Lord Meadowbank, that, according to his belief, Lord " Eldon, in moving the affirmance in 1811, did not give the " grounds of his opinion; and in the collection of the papers " belonging to the agent of General Ker, the late Mr. Hotchkis, " there is a note by him made *at the time* stating that fact. The " same fact is stated in a letter from the late Mr. James Camp- " bell, solicitor in London, to Mr. Goldie, agent for Bellenden " Kerr, which I subjoin in a note, as it is the only account I can " find of Lord Eldon's opinion*.

" * Excerpt from Letter from Mr. James Campbell to Mr. Goldie, " 8th June, 1811:

"'*Roxburghe Reduction, June* 1811.

" 'The Lord Chancellor has just now moved the House to affirm " 'the interlocutor of the Court of Session in the reduction. He " 'barely stated his own opinion upon the two material points, without " 'going into any detail. Upon the prohibitory clause, he said that " 'the words, "nor yet do any thing in hurt or prejudice of these pre- " 'sents or this tailzie or succession," were a sufficient prohibition of " 'altering the order of succession—a distinct prohibition for that pur- " 'pose—not exegetical of the preceding prohibition. With regard to " 'the fetters being to apply to the heirs of the devolving clause, and " 'to benefit them, he said that it was of no consequence in what part " 'of the deed the fetters or the heirs were placed; and that, upon the " 'most anxious attention to every thing within the four corners of the

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" In the Strathbrock case, 1838, there is unquestionably a " finding in the interlocutor of the Lord Ordinary, which appears " to be directly upon the point. But still that entail contained " irritant and resolutive clauses; and the House of Lords, who " affirmed that case, have nevertheless remitted the same point " for the opinions of Her Majesty's Judges. If I understand " correctly the opinion of the late Lord Chancellor in the Strath- " brock case, he did not appear to think that the point now " raised did then occur for decision, and waived giving any " opinion upon it. He says expressly, that there are in the " Strathbrock entail clauses irritant and resolutive applicable to " alterations in the order of succession. It does not appear, then, " that in the House of Lords the point was taken to be involved " in the decision.

" I see that reference is made, by misapprehension, to a recent " decision of the Second Division of the Court of Session, Lord " Duffus's Trustees *v.* Dunbar, &c., 28th January, 1842. The " ground of that decision is misunderstood, and the rubric in one " expression goes too far. The entail which prohibited debt " contained an express declaration that bonds and obligations " should not be granted for debt; and in one of the actions, the " heir in possession, or his trustees, concluded to have it found " that he was *entitled* to grant bonds and obligations for debt, " there being no bond actually granted. It was proposed " in that case to dismiss that action, on the ground that " the Court ought not to sustain an action to find that a " party may do a thing, which he is prohibited from doing, or

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" ' deed of 1648, and to nothing anywhere else, he had no doubt that " ' the true construction was that the fetters should apply.'

" The terms of the above very distinct letter certainly do not war- " rant the inference that Lord Eldon imagined that he was dealing with " a simple prohibition in an entail which had no fetters."

" to entertain an action to *relieve* him of the prohibition. If " he can effectually do the act, let him do it; but a party pro- " hibited is not entitled to *the aid* of a declarator against the pro- " hibition. There was another action at the instance of a " creditor, to have it found that he was entitled to adjudge. That " was the ground upon which I called the attention of the Court " to the distinction between the two actions, and I did not under- " stand that decision to go further than that an action could not " be sustained at the instance of an heir of entail to have a " decree in the abstract that he was entitled to do that which he " was directly prohibited from doing,—there being no deed or " transaction put in issue by him by the action. That I under- " stood to be the whole import of the decision. The case itself " occurred in a deed in which the irritant clause was quite " defective, limiting the protection of the estate to certain acts, " and to certain acts only, and in the question at the instance of " a creditor who was proceeding in a way not prohibited by the " irritant clause, we held that he was entitled to adjudge.

" Expressions in one of the opinions go further, but that was " upon a point only incidentally noticed. Having long enter- " tained great difficulty upon this point, I certainly did not intend " to express any such opinion as the pursuer supposes.

" If your Lordships shall not hold the point to be closed by " former decisions, then the question is one which must, in my " opinion, be decided by the terms of the Act 1685, c. 22. That " Act of Parliament, in consequence of the unsatisfactory state of " the law, was introduced in order to regulate the subject of " entails.

" I cannot think that the statute was intended to make a " complete and new code, so far as third parties were concerned, " and yet to leave the law upon a different and indeterminate " footing as to the question of settlement and power between " heirs. If not intended to regulate and settle the law as to the " rights and interests of the heirs of tailzie against the heir in

" possession, as well as against third parties, then the statute was " not only wholly defective—but begun at the wrong end. I " think the statute began systematically and according to prin- " ciple—*first*, to establish the means, and the only means of pro- " tecting the rights of heirs of entail against the deeds of the " heir in possession *by restraints on that heir;* and then, *secondly*, " as a *consequence* of such restraints, to give the means of reducing " all deeds done to the prejudice of the substitutes, and in viola- " tion of the restraints so imposed on the powers of the fiar. The " question how far an entail, when made, is to strike against " transactions entered into with third parties, relates to the *effect* " ascribed to the deed, whatever may be the character of that " deed. But the primary matter is to regulate the settlement of " the estate, and the rights of the heirs of tailzie, by the restraints " which it should be competent by tailzies to impose on the title " to lands. The restraints to be imposed on the title was the " first thing to settle, being the means of accomplishing the end " in view. The opinions expressed by the institutional writers " upon this point, appear to me to ascribe a singular view to the " Legislature, and to hold that the statute looked merely to the " *effect*, and omitted provision for that which was to produce the " effect. I have always thought that the Act of 1685 is very " skilfully and systematically drawn. I think it embraces the " whole matter of the settlement of the estates by entail, and " that it does so by beginning most anxiously to provide for " and sanction entails, in the first instance with reference to " heirs.

" The great object of an entail is to preserve the estate in the " course of succession, and for the line of heirs whom the entailer " prefers. Everything else relates to the *means* of accomplishing " that *end*. The questions as to deeds obtained by purchasers or " creditors, relate only to the *effects* of the deed which contains " the entail. But there must first be a deed containing a desti- " nation or tailzie, and rights constituted in the heirs of that

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" tailzie by a certain description of deed. And power must first " be given *effectually* to make and protect such destination, and " to vest rights in the heirs of tailzie by restraints on the fiar, " before provision can be made for reducing deeds by which the " object of the entail is to be defeated. I think that the *first* " thing done by the Act of 1685, was to sanction the right to " make a tailzie, and to fix the mode in which that was to be " done, and the form of deed 'whereby' it should not be lawful " to do acts to the prejudice of the heirs of tailzie. I think the " Act first provides for what shall be effectual to protect the heirs " —and for the only method of protecting them—and *then* makes " the tailzie, if so made, to strike against third parties, as a " *means* of accomplishing that *end*. Hence, in my opinion, the " statute begins by giving power to make a deed which *shall* be " effectual against the party holding the estate—and having a " statute thus general—complete in itself—introduced to settle a " fixed system, I am of opinion, that no deed not in terms of the " statute is effectual to bind the party in possession, or to prevent " him doing any of the acts mentioned in the statute.

" The Act 1685, c. 22, does not profess to be in supplement " of any existing and defined state of the law as to entails. It " does not contain a declaration, or proceed upon a statement, of the " law being complete, except in the cases where onerous rights are " concerned. It does not admit that there previously existed the " power effectually to tailzie estates so as to exclude alteration of " the order of succession. In truth, that is always the great and " leading object of every system of entails. On the contrary, " the Act of Parliament begins systematically, and upon a plain " method and principle, to *give right* to *tailzie* lands, and to " *substitute heirs* in the tailzie. Now the proper meaning and " import of the term tailzie is, beyond all doubt, to appoint a " specific order of heirs, who may be different from the legal " line of succession, and to cut off such of the latter as the party " chooses.

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" The Act declares that 'it *shall be lawful*' (not, as Lord " Eldon said in the Ascog case,—it *is lawful*—but it *shall* be " lawful) 'to His Majesty's subjects to tailzie their lands and " 'estates, and to substitute heirs in their tailzies.' Whatever " was the state of the law previously, which I do not think is " very material in the question, I hold it to be clear that the " statute became *thenceforth* the only *legal origin of the right to* " *make a valid and effectual tailzie*—even laying aside all refe- " rence to the effect of entails with third parties.

" Then the Act of Parliament goes on to make it lawful to " do so, 'with such provisions and conditions as they shall think " 'fit, AND to affect the said tailzies with irritant and resolutive " 'clauses, *whereby*' (that is, as Lord Eldon also says, by the " said irritant and resolutive clauses) 'it shall *not be lawful* to " 'the heirs of tailzie to sell, &c., or to do any other act whereby' " (omitting the intervening acts) 'the succession may be frustrate " 'or interrupted,'—declaring all such deeds to be in themselves " null and void, and that the next heir may pursue contra- " vention.

" 1. In this enactment, it will be observed that the leading " thing authorised and declared to be legal, is to substitute heirs " in tailzies.

" 2. Then authority is given to affect these tailzies with " irritant and resolutive clauses. So far as we have yet gone, " the destination is the main thing which is here to be protected " by such irritant and resolutive clauses, that is, the rights of " the heirs against the party in possession.

" 3. It will be observed that the effect of rendering it un- " lawful for the *heirs of tailzie* to frustrate or interrupt the " succession, is ascribed by statute directly and exclusively to " the irritant and resolutive clauses thus authorised, just as " much as the exclusion of sales and contraction of debt which " are said to be *thereby* rendered not lawful. No distinction is " drawn between the former and the latter. It is from the

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" irritant and resolutive clauses—' *whereby*'—that it is not to be " lawful for the heirs of tailzie to break the succession. The " statute acknowledges no other origin of the power to prevent " the party in possession from altering the order of succession. " It declares that it *shall* be lawful to do this in a way, *whereby* " the thing shall not be competent. Unless so done, I see no " other origin for a reduction of the act if done. It is the only " origin of the right to reduce sales and debts—that is admitted. " I think it is equally the only origin of the right to reduce " deeds of alteration. Further, the latter part of the clause, " declaring all such deeds, &c., is equally applicable to the " alteration of the order of succession as to the other acts— " whatever may be the reading of that clause, and whether the " word ' declaring' is descriptive of what is to be contained in " the irritant and resolutive clauses, or provides for what shall " be their effect.

" The result that by any means heirs of tailzie shall not have " power to break the order of succession, is thus by the statute " ascribed directly to the force of the irritant and resolutive " clauses authorised by the enactment. I cannot draw the dis- " tinction between the act of alteration and of sales or debts. " The statute says expressly that the lieges may *affect their* " *tailzies by irritant and resolutive clauses, whereby* it *shall not be* " *lawful* to sell, contract debt, *or* alter. I think as the two " former are only rendered unlawful by the force of the enact- " ment, and through the means of irritant and resolutive clauses, " the same obtains as to alteration. The statute is not decla- " ratory. It contains no reference to any existing law as to " entails. It *confers* the power to make tailzies. Hence, I hold " there can be no tailzie effectual for *any* purpose, except under " and by force of the statute. It makes these tailzies effectual " to restrain the party in possession from altering or selling " (both are put on the same footing) by means of irritant and

" resolutive clauses. I cannot hold the heir to be restrained " from *altering*, if there are not irritant and resolutive clauses.

" 4. I hold it to be inconsistent equally with the general " view, as with a sound reading, of the statute to suppose that " the Legislature admitted that, at common law, and without " irritant and resolutive clauses, it was not lawful for the heirs " of tailzie to break the succession, if they were simply pro- " hibited. I think the statute meant for the first time to sanc- " tion the power to render void an alteration in the order of " succession appointed by tailzies, and provided for the only " machinery by which that object could be secured, according " to the view taken by Parliament. To suppose that any com- " mon law was left upon one branch of this enactment unaltered " and equally operative, while the Act was only to form a new " code as to other things embraced in the enactment, is a con- " clusion to which I could not come by any reading or general " view of the statute. Such seems to me to be a result not " warranted by any consistent view of the purposes of the Act, " or by analogies in any similar cases. I find in a doubtful, " unsettled, and disputed state of the law—when the form of " accomplishing an entailer's object was, to say the least, not " clearly settled, and when public policy plainly required that " if entails were to be permitted there should be a clear system " upon the subject,—that a statute is passed which *gives power* " *to make* entails, and then in order to protect the same, says " that *irritant and resolutive clauses* may be used, *whereby* it " *shall not be lawful* to the heirs to sell, contract debt, or alter, " &c. I cannot hold that, *without* these irritant and resolutive " clauses, it shall not be lawful to heirs to alter, any more than " to sell, or that the one was left to common law any more than " the other.

" Again:—It is declared 'that *such tailzies shall only be* " ' *allowed* in which the foresaid irritant and resolutive clauses

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" ' are inserted ' in all the steps of the title. This seems to me " again to shew that no entail is to receive any effect at all " which does not contain irritant and resolutive clauses.

" Again:—When the record is appointed, it is assumed that " the tailzies therein entered shall contain *irritant and resolutive* " *clauses*, and that the same shall be repeated in all the subse- " quent titles of any succeeding heirs.

" And then ' being so insert, the same are declared to be " ' real and effectual, *not only against the contraveners and their* " ' *heirs*, but also against creditors.' The pursuer reads this as " if they are admitted to be effectual at any rate, and without " all these requisites against the contravener. I think this is " neither a sensible nor a warrantable reading. I think the " statute, *after these requisites are complied* with, and on that " condition, *declares* the tailzie to be effectual against the con- " travener, as well as against creditors; and when these requi- " sites are complied with, (among which are irritant and reso- " lutive clauses,) but not till then, are they, in my opinion, " effectual either against the contravener or against creditors. " This clause, on which an opposite construction is so often put, " appears to me to be the clearest of all the parts of the statute, " and to be undoubtedly *enacting*, as much in regard to the " contravener as to creditors. Supposing entails had never been " attempted before, would not this clause have made them effec- " tual against the contravener as well as against creditors? That " cannot be doubted. Then surely it is not admissible to hold, " that, if entails, *with* these requisites, are *declared* to be effectual " against the contravener, the statute intended to acknowledge " that entails in any form, and *without* any of these requisites, " were equally effectual against the contravener.

" According to the statute, then, I think it is plain that, in " order to be effectual against the heir in possession, the entail " must contain irritant and resolutive clauses to be engrossed in " the titles, whether to exclude the powor to alter or to sell, and

" that there is no warrant for holding any prohibition to be valid " and effectual, so as to render void the deed of alteration, if " there is not an irritant and resolutive clause.

" The statute affords a test as to the soundness of the con- " struction contended for by the pursuer. It is said that a " tailzie with a prohibition simply, is effectual to render unlawful " an alteration in the order of succession,—that it is good *inter* " *hæredes*, and that the deed may be reduced which conveys the " estate to another party as much as if there had been an irritant " and resolutive clause. Suppose, then, the prohibition which " is said thus to make the entail complete as to alteration, has " been omitted in the course of the title, will that omission " import a forfeiture? Clearly not, under the next section of the " Act, which assumes that there must be an omission of irritant " and resolutive clauses to operate as a forfeiture. Then what " an absurd species of tailzie is supposed to be effectual to prevent " alteration. Why, the heir might simply carry through a new " title in his *own* favour without the prohibition—that would " imply no forfeiture, and then his title would be one in fee- " simple, and so he might alter.

" The statute properly provides for the protection of parties " who have *bona fide* contracted with a party infeft in fee-simple, " while the tailzie has been omitted from the title. But this " clause affords no warrant, as some have thought, for holding " that the only object of the statute was to provide for the case " of contracts with third parties.

" The pursuer seems to wish to represent the point embraced " in the remit as of the same character with another very extra- " vagant proposition maintained in the case of Cathcart, viz. " that if a party did not prohibit *all* the acts which he *may* " under the statute exclude, he could not by prohibitory, irritant, " and resolutive clauses, exclude some. The first words of the " statute, which give the lieges power to put in *any* conditions " they choose, and draw so plainly the distinction between the

" *conditions* and the *irritant and resolutive clauses*, render this " notion wholly inadmissible.

" This remark leads me to another observation on the com- " mencement of the statute, which I have purposely reserved, " and which I explained at some length in a case recently " decided in the Court of Session, Dingwall's Trustees *v.* Ding- " wall. The Act says, that ' it shall be lawful to tailzie lands, " ' and to substitute heirs in their tailzies, with such *provisions* " ' *and conditions as they shall think fit*, AND to affect the tailzies " ' with irritant and resolutive clauses, whereby.' &c. Now, I " apprehend it to be clear, that the '*provisions and conditions*' " refer to the prohibitions,—that is to say, that you may insert " in the tailzie whatever provisions and conditions you think fit, " and separately, that you may render these effectual by *affecting* " the *tailzies by irritant and resolutive clauses, whereby* it shall " not be lawful for the heirs to do certain things. I think the " distinction between the provisions and the irritant and reso- " lutive clauses is most clearly and emphatically marked; and " according to that distinction it is only by the irritant and " resolutive clauses that the conditions are to be rendered effec- " tual, and that it is not to be lawful for the heirs to alter or sell.

" In the above view I regard the whole of the entail law as " depending exclusively upon statute, and I hold that the point " stated for our opinion must be resolved in this case by the " statute—which will be found sufficient for the determination " of every general point which can well be raised. In many " recent discussions I think the tendency has been to fall back " more directly upon the terms of the statute, and the result has " been to give much more certainty to the rules of decision. " I refer particularly to the opinion of Lord Lyndhurst in the " case of Munro *v.* Drummond, to his opinion, and that of Lord " Eldon's in the case of Ascog, and the Marquis of Queensberry's " claim of damages, and also to many of the opinions of Lord " Brougham.

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" If one deviates from the statute, I do not know what safe " or consistent principle of judgment can be obtained.

" For instance, the ground for reducing deeds done in viola- " tion of a prohibition is sometimes rested upon the Act 1621. " But the principle of that statute would equally reach deeds in " favour of third parties, for, whether onerous or not, they are " done to the prejudice, (according to the view of the Statute " 1621), and in defraud of the rights of the heirs of entail as " creditors under the tailzie.

" Again, if anything is rested upon the prohibition being *in* " *gremio* of the title, and so forming an effectual condition that " would apply equally to all prohibitions, and ought to be equally " effectual against third parties contracting with a person who " has a title so limited, the title and the Record of Seisins " give them notice of the limitations as much as the Record of " Tailzies; or the insertion of the entail, with a prohibition in " the Register of Tailzies, gives them as much notice of the " condition as when irritant and resolutive clauses also occur. " But if in the one case the Court is at liberty only to look to " the statute, on what ground is there to be a different rule " when the question is raised as to a deed altering the order of " succession? I see no solid distinction. The statute certainly " draws none.

" Again,—it is sometimes stated as the ground for reduction, " that the party obtaining the deed of alteration *represents* the " heir of entail, who has *violated* the prohibition, and who is " *bound* to fulfil the obligation under the deed, and to acknow- " ledge the conditions of his own title. But that view *begs the* " *whole question*, for it assumes that the statute has acknowledged " that, without irritant and resolutive clauses, a party is *bound* " by a prohibition alone, whereby an act done against it is not " lawful. I take the sound view under the statute to be, on the " contrary, this, viz., that the provision or condition (the prohi- " bition in short) is not to constitute a *complete obligation* on the

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" party, or to *restrain his power* under his title, unless the tailzie " containing the condition is *affected* by irritant and resolutive " clauses, whereby it is not to be *lawful* for him to do the " thing prohibited, whether in favour of one party or another. " Unless there are such clauses, there is no statutory or effectual " obligation.

" Besides, if that view of the case is taken, how could it be " possible to *refuse damages* for the breach of a prohibition, thus " taken to constitute a valid obligation, and to impose an effec- " tual prohibition, though the contracting party might be safe, " owing to the defect in the irritant and resolutive clause? The " view I am considering holds that the heir is bound by the " prohibition—that the prohibition constitutes a *valid obligation* " *on him*—that his act in contravention of it is a wrong—that " the party representing him cannot defend it—and that the " wrong must be repaired by annulling the deed. But is not " that principle still more strongly applicable to the claim of " damages, when the entail is even more perfect, but perhaps " not recorded; and it may be that the heir in possession is the " only one of full age in the destination, and the others have " been unable to defend themselves by putting the entail on " record? The party in that instance has committed an addi- " tional wrong by not recording the entail. He has violated the " prohibition—he has disappointed the heirs of most valuable " rights, and he has put into his own pocket an immense sum of " money by the sale of the estate, and yet he is neither bound to " reinvest nor liable in damages,—although the view I am re- " ferring to ought to lead to that result as much as to the " reduction of a deed altering the order of succession. Accord- " ingly, Lord Eldon held, in the case of Ascog, that all these " general arguments were met by the answer that the statute " drew no such distinction as that an entail was effectual against " the party in possession to any effect, if not made in the way " and form provided for by the statute. Referring to the whole

" of his opinion, I beg particularly to call attention to pages " 228-9 of the 4th vol. of Wilson and Shaw's *Appeals*.

" I solicit permission to remark, that the views which I have " ventured very reluctantly to state, when differing from those " whose opinions I so deeply respect, are rested very much upon " the effect which I think the decision of your Lordships in the " case of Ascog must have on the question stated to us for " opinion. If that case can be explained and accounted for by " *this* view alone, viz., that there was no direction to be found to " entail the lands in which the price might be reinvested, and " that there was only an entail of the lands actually sold, and " that on this ground alone it was held that no action lay for the " price against the contravener or his representative; if the case " of Ascog can be so explained, undoubtedly one main difficulty " in the pursuer's way will be removed. But I cannot so explain " that important judgment. It appears to me that it proceeded " upon very comprehensive and (with deference) sound views of " the general object and effect of the Statute 1685, and not on " any narrow technical view. I must look to it, not in reference " to the opinions of those who did not concur in the result, but " in reference to the opinions of those whose judgment prevailed. " I see that Lord Eldon had fully before him the train of opi- " nions, expressed in institutional writers as to the alleged effect " of a destination, with a prohibition, to bind the heir and to " impose obligation on him. He saw that that view was truly " at the foundation of the judgment appealed from,—that if " sound, the judgment was in substance right,—that if there was " an effectual prohibition imposing a complete obligation, then " the claim for damages or compensation *in some form* was exactly " the same as in all other cases of clear obligation, and a breach " thereof wrongously committed. Hence he examined that view " with great anxiety, and with that reach of understanding " which impresses the mind with such profound respect for the " reflection and thought evinced in his opinions. The result he

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" arrived at is rested on general principles drawn from an atten-
" tive examination of the statute, and supported by an inquiry
" into the sufficiency of the views on which it had been thought
" that damages in the form claimed were due.

" I look upon the judgment in Ascog as the one which has
" most satisfactorily cleared up the true effect and operation of
" the Statute 1685, and consistently with the view I take of it,
" I am unable to answer the question stated to us favourably for
" the pursuer.

" But it is for your Lordships to declare what was the true
" ground of judgment in that case, and what shall be taken to
" be the full and only effect of it. It is, therefore, a great com-
" fort to myself that the opinion now stated is one merely
" submitted for the consideration of your Lordships, with whom
" judgment lies, and that I have not been compelled to enter on
" this question in any case in the Court of Session.

" I own that some misapprehension seems to me to have
" arisen from the use of the expression,—'Questions *inter hæ-*
" *redes.*' All questions as to the violation of an entail are
" questions *inter hæredes;*—though the party defending the act
" may be an onerous disponee, yet he is contending that the heir
" whose act is in question was not effectually restrained from
" doing the thing challenged. The substitutes must show that
" the *heir* in possession was *effectually bound and restrained* by
" the tailzie from doing the act, before they can reduce it. The
" restraint on the heir in possession is always the foundation of
" every reduction. Hence every such question turns on the
" rights of the substitutes and on the restraints imposed on the
" heir in possession. When an onerous third party defends the
" act, the inquiry is still, was the contravener effectually re-
" strained in favour of the heirs of tailzie? All such ques-
" tions are truly questions *inter hæredes*, in the only sense of
" the term that is material. Now, in trying that question, I
" cannot find any ground for holding that, *under this statute*,

" there is any difference as to *power* on the one hand, and pro-
" tection to the heirs of tailzie on the other, whether the point
" is tried with the contravener or his representative, or with a
" third party.

" In some of the discussions upon this subject, it is said that
" deeds altering the order of succession are reducible because
" *mortis causa*. But that is in truth the use of a term without
" attaching any distinct meaning to it, because the very same
" opinions in the institutional writers undoubtedly hold deeds of
" alteration to be unlawful and reducible, although taking effect
" immediately *inter vivos*. Hence the effect ascribed to a pro-
" hibition is really not rested upon the fact that the deed is
" *mortis causa*.

" But I own I am at a loss to understand how this point,
" viz., that the deed is *mortis causa*, bears upon the question,
" either under the statute or on principle.

" The view, founded on the statute, it cannot affect.

" On principle, it seems to have no relevancy. Every man
" may effectually alter the destination of his estate by a deed
" which he may retain in his own possession and in his own
" power, *if he is not validly restrained from doing so. If* he *is*
" restrained, he can neither do so during his life, nor by leaving
" at his death a deed of alteration. If he is not restrained, then
" the deed is still his act, *of the date it bears*. There is nothing
" unlawful in his retaining full possession and enjoyment of
" the estate under a title which does not exclude alteration,
" and in leaving a deed which so alters. This seems to be the
" natural course to follow in every case where the title does not
" exclude alteration. Then, when the disponee produces the
" deed, and claims to act under it, it must receive effect, *unless*
" the title by which the granter held the estate barred alterations.
" And if it did, then upon *that* ground effect must be denied to
" the deed, whether it is to be acted upon at one period or at
" another.

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" The question is very different from that which has occurred, " —whether a *faculty* or *permission* must be exercised during a " person's life to the extent of doing the thing permitted in his " own lifetime, and not merely by a posthumous act against his " successors? If, for instance, there is a *power* to sell for debt, it " may be a question whether, if the heir in possession does not " sell, he can leave a trust-deed to take effect upon his death, " with power of sale, seeing that if the act is not done in his " lifetime, it may be said that his power over the estate is termi- " nated, and cannot be exercised after his death. This was a " point in the Newton Don case; and there are other nice ques- " tions of this class. But there is no question in the present " case raised as to the exercise of a *faculty* or *permission* to do a " certain thing. A deed of alteration is either effectually " excluded, or it is not. If it is not, then the proprietor may " alter, like any other proprietor, in any form he chooses, whether " by a deed taking effect *inter vivos*, or by a deed left to take " effect after his death. Again, while the fact that a deed is left " to take effect after death, is of importance in another respect in " some questions, as, for instance, whether a fee was passed " under it or not, or whether the granter remained truly the " proprietor, or in some questions of fraud, yet it is to be kept in " view that a deed is perfectly good to effect an alteration of the " order of succession, though not produced or acted upon till " after the party's death. It is a deed effectual, because executed " according to its date by a party alive and in possession under a " title which does not exclude alteration. Well, then,—in con- " sidering the effect of his title,—viz., whether it excludes altera- " tion or not,—can it possibly be of any importance whether the " deed is produced before or after the party's death, seeing that " its validity depends entirely on the effect of the title in restrain- " ing alteration or not. If not excluded, the deed must be " effectual; and hence all that is said about *mortis causa* deeds " is really of no avail.

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"It appears to me that the fact that the deed of alteration is "*gratuitous*, is of as little relevancy in point of principle, even if "the question did not turn exclusively on the statute. The "validity of restraints under an entail does not depend upon the "point—what benefit the heir in possession gets by the deed of "contravention, or the extent of benefit obtained by the grantee. "It is a question exclusively of *power*. Either the prohibition is "in itself sufficient, or it is not. If sufficient, then, although a "party were to purchase a *deed of alteration* at a very great cost, "leaving the other in possession during his lifetime, I presume it "cannot be doubted that, according to the pursuer's argument, "the deed, if a proper deed of alteration, would be reducible "without reference to the amount of benefit on either side, be-"cause it was a deed of alteration, and not a proper sale. I am, "therefore, at a loss to understand how the fact, that the deed is "gratuitous, bears upon the question of power, or is of any value "according to the view that is taken, viz., that the prohibition is "effectual to prevent the heir in possession frustrating the order "of succession, though it does not exclude a sale or contraction of "debt. Upon that principle it ought equally to exclude a pro-"curatory for new resignation in favour of a second son, for "which the latter may have, at some time or other during his "father's life, paid very large sums in order to *succeed* to the "family estate. But still the transaction may have none of the "proper characters of a sale,—could not have been defended upon "that ground alone,—and the party may be liable *ad valorem* as "a representative for debts.

"On the whole, in short, I cannot see upon what principle "any remedy can be given in the case of the violation of a prohi-"bition against altering the order of succession not enforced by "irritant and resolutive clauses, which would not also support a "remedy in other cases.

"This is plainly the result of the very elaborate opinion of "Lord Eldon in the Ascog case, already referred to.

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" Considering the opinions of the institutional writers, it may " be thought too late to fall back on the statute for the determi- " nation of the point involved in the question put to the Judges. " I acknowledge that when the terms of a statute have received " a certain interpretation by judgments of the Court, it would be " very hazardous to construe the statute without the light and " guide of such decisions. But if this question is not distinctly " and authoritatively settled by decisions, it humbly appears to " me that there cannot be a safer course than to consider the " point with reference to the statute alone.

" The Act 1685, c. 22, is drawn with consummate skill for " the objects it had in view. Every question which has yet " occurred in entail law has been solved by the force of the " statute, when its terms have been duly considered. It appears " to me to be intended to introduce, fix, and arrange a *system of* " *entails.* It *gives power* to make an entail. It acknowledges " no power to do so in any other form or manner—(the extension " of its sanction to deeds executed prior to its date, if in terms " of it, and recorded under it, is a different point). It begins " with declaring how the heir in possession may be restrained in " his powers as proprietor, by *clauses whereby* it shall *not be lawful* " for him to do certain acts. In no other way is it said that " these acts can be declared not to be lawful. This is the " *foundation* of all that follows. Among the acts which it *shall* " be lawful *so to prevent* him doing, is alteration of the order of " succession. When the question then is put to me,—Is he " prevented from altering, I feel that the statute constrains me to " inquire,—is the restraint imposed *in the form* and with *the* " *requisites of the statute?*—in the way in which power is given " to impose the restraint, in order to accomplish the end of pre- " venting the act? If not, then under the statute I must " answer that he has not been prevented from altering in the " only way in which he could have been competently and " effectually prevented

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" I have therefore to state my opinion to be, that if the irri-
" tant clause is not directed against the institute, the deed of
" entail is otherwise not sufficient to exclude or render void the
" disposition or deed of alteration of the order of succession under
" reduction.

" JOHN HOPE."

" November 29, 1842."

" LORD FULLERTON.—In answering the question proposed to
" us, it is of importance to keep in view the nature of the deed
" under reduction, and the object and effect of the reduction if
" successful.

" In the *first* place, the deed is not one of alienation, even
" gratuitous. It is a disposition by Mr. Thomas Carrick, the
" institute, by which he sold, alienated and disponed the lands
" contained in the entail, 'from me, in favour of *myself and my*
" *heirs and assignees;*' and the statement of the defenders is, that
" they, 'after *having been served heirs*-portioners to him *cum bene-*
" *ficio inventarii*, have taken infeftment in virtue of the dispo-
" sition executed by their said brother.' Whatever difficulty
" there may have been, in some cases, in defining an alienation, it
" is a palpable misnomer to apply that term to a conveyance by a
" disponer in favour of himself. The deed in question is strictly
" and technically, a deed altering the order of succession. If
" published during the lifetime of the granter, it might have been
" the subject of reduction against him, and every ground of
" reduction good against him, must be equally good against the
" respondents, who do not take from him, but through him, and
" are liable, as his heirs, in the observance of his obligations.
" *Secondly*, The object of this action, and its effect, is not to
" enforce the obligation contained in the entail, indirectly,
" through the medium of a claim of damages and for investment
" of price. It is to enforce directly that obligation; to annul the
" deed granted in violation of it, and so to replace the lands under

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" that title, from which, according to the pursuers' view, the " granter of the deed had no power to withdraw it.

" The question then is, whether the absence of an irritant " clause in the original entail, is sufficient to exclude the pur- " suers from the remedy which they seek. The affirmative is " maintained by the defenders; mainly on the ground, that the " Act 1685 forms the absolute and exclusive test, for determining " the powers of those possessing under entails, and the rights of " expectant heirs—that, in short, no deeds granted or acts done, " can be effectually challenged, unless the prohibitions relating to " them be fortified by the irritant and resolutive clauses autho- " rized by the statute. But this, again, will be found to involve, " alternatively, one of two propositions, namely, either that the " prohibitions violated by the deed under reduction, were in " themselves bad at common law, and required the enactments of " the statute to render them effectual; or that though originally " good at common law, their effect at common law was extin- " guished by the statute, and the powers of proprietors to impose " them, were, from the date of the statute, rendered dependent on " an exact compliance with its provisions.

" On considering these points, with all the attention which " their importance demands, I have not been able to satisfy my- " self, that either the one or other of these alternative propositions " is well founded. On the contrary, it appears to me, that both " of them are irreconcileable with authority, and at variance with " a uniform series of decisions of this Court, some of them not " merely analogous but identical, pronounced since the statute was " passed.

" In regard to principle, it would be difficult to see the ille- " gality of a proprietor who conveys his estate to a disponee and " a series of heirs, providing that neither the disponee, nor any " individual heir, shall defeat the rights of those to come after " him, by *mortis causa* deeds or alienations. That being the " condition upon which the disponee and each successive heir

" takes the estate, and the condition not being illegal in itself, " there can be no conceivable reason, why the obligation not to " violate it, should not be available and an apt subject of action.

" Again, as the condition confers a right on the subsequent " heirs, to take the estate by succession, a right substantial in " itself, though peculiar in its nature, a *jus quæsitum* thence " arises, enabling those expectant heirs to challenge and annul " any violations of that condition, not merely against the violators " of the condition, but against such of his successors as are in law " affected by his obligations. Accordingly, on looking at the " authorities in regard to the law as it stood, prior to the passing " of the statute, it cannot well admit of a doubt, that they all " considered prohibitions directed against altering the order of " succession, or even against alienations and contracting debt, as " creating a *jus crediti* in the substitutes, enabling them to chal- " lenge gratuitous deeds done in violation of those conditions. " Indeed this matter seems to have been considered so clear and " of so little importance, in comparison with that which chiefly " engaged their attention, viz., the effect of such clauses against " onerous transactions, that it is not very wonderful that their " views upon it are very briefly, and perhaps somewhat loosely " expressed. As an instance of this, may be remarked the " reference by some of those authorities to the Act 1621, as the " proper instrument for reducing gratuitous deeds done to the " prejudice of such prohibitions. For, although this reference is " quite conclusive of the opinion of those learned persons, that " such prohibitions raised in the person of the substitutes an " available right of credit in their due observance, it would " rather appear that such a right of credit did not necessarily " require the assistance of the Act 1621. In the case of personal " debts having no connection with the heritable estate, the " debtor, though under a moral obligation not to defraud his cre- " ditor by making away with his estate, is unquestionably under " no direct legal obligation in regard to the estate itself; and,

" consequently, a positive statute might be necessary to enable " personal creditors to reduce gratuitous alienations, on the pre- " sumption, perhaps somewhat arbitrary, of fraud. But when " the *jus crediti*, the obligation itself, had direct reference to the " estate, namely, not to convey it away to the prejudice of the " expectant heir, that right of credit, if good at all, required the " intervention of no statute. It could neither be made better nor " worse by the Act 1621, and must have enabled the expectant " heir to enforce directly the observance of the negative obliga- " tion, by reducing the deed done in violation of it.

" But though the Act 1621 might not be a *necessary* instru- " ment for the reduction of such deeds, there seems no good " ground for questioning, that they did fall within its provisions, " and that consequently it might be legitimately so applied. The " words of the Act of the Lords of Council and Session, confirmed " by the statute, declare, that 'in all actions and causes depend- " ' ing or to be intended by any true creditor for recovery of his " ' just debt, or *satisfaction of his lawful action and right*,' ' they " ' will decrete and decern all alienations,' &c., made to conjunct " and confident persons, without just and necessary causes, and " without a price being paid, to be null. Now, in the case con- " templated, 'the recovery of the creditor's just debts, or *satis-* " '*faction of his lawful action and right*,' implied a restoration " of the lands to that tenure and line of descent in which he " stood as an expectant heir; and consequently, if claims to that " effect could be held to constitute rights of credit, or grounds of " ' lawful action,' on the part of the expectant heirs, alienations " falling under the description contained in the statute, to the " prejudice of such rights, were deeds which the Court were, by " the terms of the statute, bound to decern and decree to be " null. Assuming then, that simple prohibitions did *inter* " *hæredes* confer rights of credit, those learned authorities were " fully justified in holding that gratuitous alienations in violation " of them were reducible under the Statute 1621. And it is

" also to be observed, that the right founded on the Act 1621, " never could be extended beyond gratuitous deeds, or applied to " the case of onerous transactions; for that statute is expressly " limited to alienations without just and necessary causes, and " without the payment of a just price.

" But the important consideration is, that every authority " holding such alienations to fall under the Act 1621, does by " necessary implication hold that such prohibitions in themselves " confer a right of credit,—a right of credit which, for the " reasons already assigned, I should be disposed to consider the " assistance of the Act 1621 not necessary to enforce.

" Looking, then, at the whole train of authorities on this " point as it stood before the Act 1685, there does not seem to " me to be a doubt, that they all considered prohibitions against " altering the order of succession, and even against alienation " and contracting debt, to be effectual against gratuitous deeds, " as raising a right of credit in the expectant heir, independently " of irritant and resolutive clauses. Stair, Mackenzie, Hope, " all appear to concur in this; and indeed I am not aware of any " one authority to the contrary. Accordingly, if the only object " of entailers had been the prevention of gratuitous deeds, I think " the fair presumption is, that the interference of the Legislature " never would have been required.

" But to those whose feelings and prejudices rendered the " descent of their landed estates unaltered and undilapidated " through a long line of heirs, a matter of importance, clauses " not operating beyond gratuitous conveyances could afford but " little security. Sales, debts, and the accompaniments of " apprizings and adjudications were likely to be much more " fatal to such views of posthumous regulation than gratuitous " alienations *inter vivos*, which are but of rare occurrence, " or even alterations of the order of succession by *mortis causa* " conveyances. Consequently it was against onerous trans- " actions that the ingenuity of lawyers and conveyancers was

" taxed to provide a safeguard, and certainly never was in-
" genuity more zealously, but more fruitlessly, exerted. In the
" case of merely gratuitous, and consequently unilateral deeds,
" the condition not to alter or alienate, forming at the lowest a
" personal obligation against the granter, was, particularly when
" inserted in his titles, an obligation equally available against his
" representatives and the gratuitous donees, who held in them-
" selves no independent right—no character entitling them to
" shake themselves loose from the obligations, even personal, in-
" cumbent on the donor. But in onerous transactions a very
" different element was let in, namely, the independent right of
" the onerous purchaser or creditor. There was then involved,
" not merely the obligation of the proprietor not to contract debt
" or alienate, but the right of a creditor or purchaser to adjudge
" and to take possession. And accordingly this distinction
" between the validity of onerous and gratuitous deeds is one
" which pervades the whole of this branch of our law. It is
" quite a mistake to state the difference between gratuitous and
" onerous as a difference merely between the motives or con-
" siderations affecting the mind of the granter, and therefore as
" one extrinsic to his powers. It does affect his powers, and
" that most materially, if by power is meant his capacity to do a
" thing unchallengeably and with certain effect. A party hold-
" ing property under merely personal obligations has not power
" to violate those obligations by gratuitous deeds, because the
" obligations, though personal, are transferred against the donees,
" while he has the power to execute onerous deeds, because such
" obligations, if personal, are not transmitted against the one-
" rous acquirer. It is equally correct in expression and sound
" law, then, to state, that such a party has no power to grant
" gratuitous deeds, and has the power to grant onerous deeds,
" because he one description of deeds can be reduced and the
" other cannot.

" The difficulty, then, was to devise means by which the

" estate could be protected against onerous transactions, a diffi-
" culty which, however, was insurmountable, when we consider
" the two principles of law which were even then considered as
" perfectly established. In the *first* place, that each disponee or
" heir taking under an entail was the fiar in the full real right
" of property; and, *secondly*, that whatever were the personal
" obligations a fiar so vested might lie under, every third party
" was, by the law of the land, entitled to acquire unchallenge-
" ably, for onerous causes, the full right which was in the party
" with whom he dealt. No condition, then, which did not
" qualify or abridge the real right in the fiar could affect the
" right of the singular successor. Various ingenious contriv-
" ances, indeed, were resorted to for that purpose. Such was
" evidently the origin of irritant and resolutive clauses. Thus,
" Hope, after stating the difficulties attending the use of inhibi-
" tion, which was one of the measures resorted to, and the
" inefficiency of it, proceeds (tit. 16, sec. 5)—' But to *prevent*
" ' *and remeid this* there is *a new form found out*, which *has*
" ' *these two branches*, viz. either to make the party contractor of
" ' the debt to incur the loss and tinsel of his right in favour of
" ' the next in tailzie; or to declare all deeds done in prejudice
" ' of the tailzie by bond, contract, infeftment or comprising, to
" ' be null of the law.' He then enters into a discussion as to
" the effect of such clauses, and he arrives at the conclusion that
" they would be effectual. But the sounder opinions seem to
" have been the other way. The irritant clause, annulling debts
" and deeds, which the public law of the land recognized, seems
" to be clearly beyond the reach of any private provision; while
" the resolutive clause which, from its very nature and object,
" implies that the complete right had previously vested, could
" be viewed in itself as nothing but a personal condition, and
" consequently ineffectual against singular successors. According
" to *Stair*, b. i. tit. 14, sec. 5, 'if the buyer become once the
" ' proprietor, and the condition is adjected that he shall cease to

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" ' be proprietor in such a case, *this is but personal; for property*
" ' *or dominion passes not by conditions or provisions, but by tra-*
" ' *dition and other ways prescribed in law.*' And accordingly,
" though in one case, that of Stormont, effect was given to a
" prohibition fortified only by a resolutive clause, in a question
" with onerous creditors; that decision appears to have been
" considered even at the time as but of dubious authority.

" The whole of these curious questions as to the effect of
" irritant and resolutive clauses were set at rest by the Act
" 1685, cap. 22, which defined the conditions, on the observance
" of which such clauses should receive effect against onerous trans-
" actions, and on the non-observance of which they should have
" no such effect. But while it may be admitted, and is indeed
" now fixed in practice, that this statute forms the rule by which
" all competition between the rights of heirs of entail and those
" of onerous third parties must be tried, I must be permitted to
" doubt whether there is any good ground for holding that that
" statute, in sanctioning the operation of irritant and resolutive
" clauses in matters previously questionable, extinguished or in
" any way affected those common law rights created in favour of
" the substitutes by prohibitions, which never seem to have
" required irritant and resolutive clauses to protect them. On
" the contrary, I think it clear, from those authorities who
" treated of the subject at the very time, that the statute was
" not understood to have that effect. Lord Stair, in treating of
" clauses resolutive, concludes (B. i. tit. 14, sec. 6)—' And now
" ' there is a special statute regulating tailzies *and clauses irri-*
" ' *tant:*' and in another passage, after mentioning the case of
" Stormont, he refers (B. ii. tit. 3, sec. 58) to the statute as
" sanctioning *clauses irritant* in taillies, for the observance of the
" conditions there laid down, ' which, if they omit, it shall infer
" ' a nullity of their right, but shall not prejudice creditors so
" ' contracting *bona fide, which weakens the former tailzies with*
" ' *clauses irritant.*' These expressions seem to me to imply,

" that the only common law right which was weakened was " that very questionable one of affecting the entail with clauses " irritant,—a right which, in order to be effectual against cre- " ditors and purchasers, required to be exercised in terms of the " statute. Mackenzie is still more explicit. After describing " the second class of entails containing merely prohibitions, which " he holds to be good against gratuitous deeds, he (B. iii. tit. 8) " proceeds to describe the third class. He says,—' If the maker " ' design that the tailzied lands should not be alienable even " ' for onerous causes, then he adjects to the *pactum de non alie-* " ' *nando*, a *clause irritant and resolutive*;' and he concludes, " ' because *such clauses* prejudge creditors and commerce very " ' much, and seem to be inconsistent with the nature of pro- " ' perty and dominion, therefore an Act of Parliament *was* " ' *necessary for securing them.*' Here I think it is clearly ex- " pressed, and that too by a person of all others likely to be " acquainted with the true object and reading of the Act 1685, " that while prohibitory clauses are in themselves effectual " against gratuitous deeds, it was only the irritant and resolutive " clauses rendering them inalienable even for onerous causes, " which required the sanction of the statute. A similar opinion " is expressed by Erskine, by Bankton, and in so far as I know, " by every institutional writer who has treated of the subject.

" And I think this is the fair reading of the statute itself, " which seems to contain nothing extinguishing any common " law right, or rendering dependent upon the observance of its " provisions any right whatever, which did not require irritant " and resolutive clauses to protect it. The leading enactment is, " ' that it shall be lawful for His Majesty's subjects *to tailzie* " ' *their lands*,' &c. and ' that *such tailzies only shall be allowed* in " ' which the foresaid irritant and resolutive clauses shall be " ' insert in the titles, and the original tailzie entered on the " ' record,' &c. The inference from this, that no tailzies *should* " *be allowed*, *i. e.*, should have any effect whatever, except those

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" which contained irritant and resolutive clauses, published in " terms of the statute, refutes itself by going too far. If it were " correct to the extent of excluding all prohibitions without " irritant and resolutive clauses, it must be just as effectual in " invalidating simple destinations without either the one set of " clauses or the other.

" But the inference appears to me to rest entirely upon a " most arbitrary construction of the statute. Its enactments " must be read together. The leading enactment declares what " it shall be lawful for the entailers to do, viz., to tailzie their " lands, and to substitute heirs, with such provisions as they " shall think fit, '*and to affect the said tailzies with irritant and* " '*resolutive clauses, whereby*' it shall not be lawful to sell, " annailzie, or contract debt, or alter the succession,—being the " enumeration of the acts to be struck at by these irritant and " resolutive clauses. The fair construction certainly is, that it " shall be *lawful to tailzie*, with the additional security of irritant " and resolutive clauses directed against the acts enumerated. " And the mention of the alteration of the succession in that " enumeration is by no means superfluous; because, though the " simple act of altering the succession might not require an " irritant and resolutive clause to prevent it *inter hæredes*, yet if " the party holding under that alteration alienated for an onerous " cause, an irritant and resolutive clause might be necessary to " annul that link of the title against the onerous purchaser.

" The next head of the statute declares the terms upon which " these powers shall be exercised, namely, *such tailzies*, *i. e.*, the " tailzies previously described, fortified by irritant and resolutive " clauses, shall only be allowed, in which the aforesaid irritant " and resolutive clauses, are insert in the titles; and the original " tailzie, with all its substitutions and irritant and resolutive " clauses, shall be produced before the Lords of Session, &c.

" There is then the provision for the repetition of all the " provisions and irritant clauses in all the subsequent con-

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" veyances of the lands. Lastly comes the important declaration: " ' And being so insert,' (*i.* . the provisions and irritant clauses), " ' His Majesty, &c., declares the samen to be real and effectual, " ' not only against the contraveners and their heirs, but also " ' against their creditors, comprisers, adjudgers, and other sin- " ' gular successors whatsoever.' Now, is there any thing in " these various enactments, which, upon a sound construction, " renders any provisions, good at common law previously to the " statute without irritant and resolutive clauses, dependent on " the addition of irritant and resolutive clauses, and the exact " observance of the statute in regard to such irritant and reso- " lutive clauses? I think not. The expressions rather seem to " me to warrant an inference the very reverse. If there were " provisions legally operative *inter hæredes* before the statute, " without irritant and resolutive clauses, but which were not " operative against third parties without irritant and resolutive " clauses, while the effect of those irritant and resolutive clauses " themselves was doubtful, the form of expression was quite " natural, in enacting that the provisions and irritant clauses, " when published in a particular way, should be effectual, not " only against the contravener and his heirs, as the provisions " had been before, independently of the statute, but also against " their creditors, comprisers, and singular successors.

" It appears to me that this is the natural reading of the " statute; and what is of much more importance than any " opinion of mine, it is the reading of the statute, which has " received the uniform sanction of the Court since the passing of " the statute itself. In every case that has occurred, in which " there was room for the distinction, the distinction has been " taken, and given effect to, between onerous transactions requir- " ing the sanction of the statute to invalidate them, and gratui- " tous deeds, in regard to which, in questions *inter hæredes*, the " sanction of the statute, and the observance of its provisions " were held to be unnecessary.

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" In the case of Callender, *Mor.* 15,476, occurring imme-
" diately after the passing of the statute, it was 'found that a
" ' prohibitory clause was a sufficient ground for the next heir to
" ' reduce, upon the Act 1621, any gratuitous deeds, *though it*
" ' *wanted a clause irritant*,' and I have already submitted my
" reasons for holding that the application of the Act 1621 neces-
" sarily implies that a prohibitory clause, without irritant and
" resolutive clauses, was sufficient to create a *jus crediti* in favour
" of the expectant heir. Neither can I see how the authority of
" this decision, or any others resting on the Act 1621, can be
" questioned; as countenancing the operation of a bare prohi-
" bitory clause against creditors or singular successors. That
" statute never could have any such effect. It is *in terminis*
" limited to alienations made without just and necessary causes,
" and without a just price really paid.

" The same principle was sustained in the case of Ure against
" Earl of Crawford, 17th July, 1756, *Mor.* 4,315, in which the
" only peculiarity was, that the condition, not to sell, contract
" debt, or do any other deed by which the lands might be
" affected, does not seem to have entered the title at all, but was
" contained in a separate obligation. This specialty was evi-
" dently rather unfavourable than otherwise, to the heirs found-
" ing on the condition, and yet it was held sufficient to support
" the reduction of a gratuitous conveyance,—that reduction, as
" would appear from the report, being rested, not on the Act
" 1621, but simply on the contravention of the prohibitory
" clause. A similar judgment was pronounced in the case of
" Craik against Craik, *Mor.* 4,313, in which the question seems
" to have turned entirely on the onerosity or non-onerosity of
" the deed challenged.

" For it must be observed that the decisions in which effect
" was refused to a bare prohibitory clause, are no less instructive
" on this point, than those in which its effect was sustained.
" In almost every one of those cases, it was conceded in argu-

" ment by the party supporting the deed of contravention, and " assumed by the Court, that a prohibitory clause was good " against gratuitous deeds; so that the only subject of debate " truly was, whether the deed under challenge should be held to " be onerous or gratuitous. Thus, in the case of Bruce of Red- " heugh, *Mor.* 15,493, in which the point at issue was the effect " of an entail defective in some of its clauses, the argument " on the part of those denying effect to the prohibitions, was " entirely founded on the distinction between onerous and gra- " tuitous. ' These prohibitory clauses may have indeed the " ' strength of an inhibition *to reduce any voluntary gratuitous* " ' *deeds, as was found in the year* 1687 *betwixt the Earl of Cal-* " ' *lender and Lord John Hamilton*, now Earl of Ruglen; but " ' without an irritant clause annulling the fee, *they can never* " ' *prejudge lawful creditors.*' And according to the same report, " ' The Lords found that the tailzie in this case did not effec- " ' tually bind him up from contracting debts, and therefore " ' found his daughter, as served to him, liable for his debts, and " ' that this tailzie was not in the terms of those now settled by " ' the Act of Parliament 1685, and *that the clause imported no* " ' *more but the discharging, altering, and changing the order of* " ' *succession and all gratuitous deeds, and could go no farther.*' " The same doctrine was recognized in the case of the creditors " of Primrose against heirs of entail, referred to in the case for " the pursuer. Indeed, the general nature of the matter in dis- " pute in such cases is accurately described in the report, by " Lord Monboddo, of the case of Logan against Drummond, " July 14, 1752, *Brown Supp.* 798, vol. v., in which the deed in " dispute was ultimately sustained; he says,—' The Lords were " ' *all of opinion*, 1*mo*, *that the clause prohibiting the alteration of* " ' *the succession excluded all gratuitous alienations of the subjects;* " ' 2*do*, that it did not exclude alienation for onerous causes; so " ' that the *only question was* whether or not the marriage and " ' marriage-settlement upon the lady and her heirs *was such an*

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" ' *onerous consideration as would defeat the substitution, fortified*
" ' *by the prohibitory clauses above recited.*'

"Further, the effect of conditions merely personal, in questions " *inter hæredes*, independently of the Act 1685, is necessarily in- " volved in the decisions giving effect to an entail unrecorded. " According to the fixed principle in our law, the right having " once vested in an heir in possession, a resolutive clause, an- " nulling his right in a certain event, is nothing but a personal " condition. If, then, it could be held, that from the date of the " Statute 1685, no personal condition was effectual, even *inter* " *hæredes*, except by the force of the statute; it must follow, that " no heir holding under an unrecorded entail, could incur a for- " feiture of his right by contravention. Accordingly, that was " the very argument maintained in the case of Willison against " Callander of Dorator, *Mor.* 15,369-70. But 'the Lords found " ' that the resolutive clause was effectual.' And this leads me " to observe, that there are many provisions and conditions " which have hitherto stood unquestioned, in regard to the rights " and obligations of heirs, and which can be derived from no " other source than the common law, independently of the " statute. The statute sanctions irritant and resolutive clauses, " whereby it shall not be lawful to sell, annailzie, contract debts, " or to alter the order of succession, declaring such deeds to be " in themselves null and void, &c. That is quite intelligible, in " so far as it applies to the rights of third parties, which rights " necessarily imply, the intervention of some positive act to " create them. But what becomes of all those provisions and " conditions, of which the subject is not a prohibition against " doing, but a positive injunction to do, certain acts. It is clear, " that although these last admit of a resolutive clause on failure, " they admit of no irritant clause. Such injunctions, indeed, do " not seem to fall within the description of cases, to which, by " the terms of the statute, it is competent to attach either irritant " or resolutive clauses. For instance, to take the most ordinary

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" of all clauses, the obligation to assume the name and arms, " clearly admitting of no irritant clause, I do not well see where " there is any authority in the statute, for attaching a resolutive " clause to such a condition, or how either the provision or a " resolutive clause can operate at all, except on the ground that " the rights and obligations thence arising, exist merely *inter* " *hæredes*, and consequently do not require the support of the " statute. The same may be said of clauses of devolution, bind- " ing the heir to surrender the estate in particular events, as, on " succeeding to a title, or various others easily supposeable; so " that I do not think that this new doctrine of the statute, " forming the single test of valid personal obligations, even *inter* " *hæredes*, can be maintained, without overturning many of the " hitherto generally received principles in this branch of our " law.

" Although sensible of the undue length to which these " remarks extend, I feel it necessary to notice two other de- " scriptions of cases, 1*st*, because the principles laid down in them " have the authority of our latest practice: and, 2*ndly*, because " they appear to me to be cases directly in point.

" The first consists of those touching the effect of entails un- " supported by the statute, in regard to the provisions of widows. " In one of the older cases, Anderson *v.* Wishart, *Mor.* 13,576, " a clause excluding courtesy and terce, the entail being not " recorded, was not held effectual against the widow. And " certainly much might be said in favour of that decision, on the " ground of the right of terce being onerously acquired. But a " different rule is now laid down by a series of decisions, of " which it is impossible to question the authority. In the case " of Gibson *v.* Reid, *Mor.* 15,869, the question was, whether a " clause excluding the terce, but without an irritant clause, " could take effect against the widow? The Court found that it " did, upon the ground that, 'like the *jus mariti*, it may be " ' excluded by the terms of the grant, which are strictly *obliga-*

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" ' *tory on the widows and children of the substitutes without irritant*
" ' *and resolutive clauses.*' That was again confirmed in the case
" of M'Gill *v.* Law, June 13, 1798, in which, as in the old case
" of Anderson, the question was raised on an unrecorded entail.
" The point was held to be ruled in the case last alluded to, that
" of Gibson—' The Court considered that case to be decisive of
" ' the present. In the former case, it was observed, the entail,
" ' though recorded, was ineffectual against creditors, from want-
" ' ing an irritant clause; *but irritant and resolutive clauses, and*
" ' *consequently registration, are unnecessary to make entails*
" ' *effectual intra familiam of the substitutes.*' *Lastly,* In the
" case of the Duchess of Roxburgh *v.* the Duke, January 11,
" 1820, the Court held a provision of 4000*l.*, in addition to her
" jointure contained in a postnuptial contract, to be ineffectual
" against the next heir of entail, the entail not having been
" recorded; on the ground, as appears from the report, ' *of want*
" ' *of power* in the Duke to grant the provision under the per-
" ' mission of the entail, as being excessive in addition to the
" ' locality, *and as gratuitous, being contained in a postnuptial*
" ' *contract of marriage.*' Nothing can bring out more clearly
" the distinction, even in a question of power, between onerous
" and gratuitous deeds. If it had been a bond for borrowed
" money, or if the provision, though in a postnuptial contract,
" had been within the limits of a fair allowance, and had been
" thus constructively onerous, it must be held to have been
" effectual against the next heir, as within the powers of his pre-
" decessor, holding by an unrecorded entail. But, once held
" gratuitous, it was of no effect. In short, it is a decision
" exactly in point on the present question, namely, that a pro-
" vision not good, according to the requisites of the Act 1685, is
" still entitled to effect against gratuitous deeds, in a question
" with the next heir.

" The other description of cases, having an important bearing
" upon the present point, includes those touching the powers of

" an heir in possession under an imperfect entail, either to extend " the line of succession or to complete the entail, in terms of the " Act 1685, by the addition of irritant and resolutive clauses. " The incompetency of this is now fixed by a long series of " decisions. The only intelligible ground upon which this can " rest, is the disability of a party, barred from altering the order " of succession or disponing, to execute any conveyance good " against the subsequent heirs, so as to oblige them to take the " estate under that deed, instead of the original entail under " which he himself holds. It may be said, indeed, that if the " prohibition creating this disability, was fortified by an irritant " and resolutive clause, the existence of a perfect obligation not " to violate it involved no inconsistency with the plea of the " defenders. But it so happens, that in the two latest decisions " upon this very point, that of Meldrum *v.* Maitland, 29th June, " 1827, and the Earl of Fife *v.* Duff, 7th March, 1828, the only " prohibition contained in the imperfect entail had no irritant " clause attached to it.

" In the first case, Meldrum and Maitland, in addition to " that of taking the name and arms, &c., there was the provision " that it should not be lawful to 'alter the destination above " 'written by contract of marriage, or by any other deed " 'gratuitously to disappoint the order of succession,' and this " was followed by a resolutive but no irritant clause. A party " holding under this entail executed a new deed in favour of the " same series of heirs, containing additional fetters against selling " or contracting debt; and, at the same time, she, by another " deed, conveyed part of the lands, and also one-fourth of the " free rent of the whole estates, to trustees, for payment of pro- " visions to her younger children. Both deeds were brought " under reduction by the heir-apparent under the original entail; " and both deeds were reduced, the argument on the part of the " pursuers, as condensed in the report, 5 *S.* & *D.*, p. 859, being, " 'that an heir in possession under an imperfect entail, *whatever*

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" ' *may be his powers in reference to third parties, is bound by* " ' *the conditions of the grant in all questions with the other heirs* " ' —that, as he takes and enjoys under *the conditions of the* " ' *deed*, he is bound to respect those conditions,' &c. It is clear, " that if a prohibitory clause, without an irritant clause, had " been of no avail against gratuitous deeds, such a judgment " never could have been pronounced. On the assumed view, " that no provision, unless secured in terms of the Act 1685, " could avail even *inter hæredes*, the deeds in that question must " have been as little subject to challenge as if they had been " granted by a party holding under a simple destination.

" The other case, that of Lord Fife against Duff, 6 *S.* & *D.*, " p. 698, was of the same kind. There was a prohibition " against altering the tailzie or order of succession, with a resolu- " tive, but no irritant clause. A party holding under this deed " executed a new and strict entail, with prohibitory, irritant, and " resolutive clauses; and, in doing so, made a very slight altera- " tion in the order of succession. The heir entitled to succeed " under the former entail, brought an action for setting aside the " last entail, the summons being laid, not on the Act of 1621, " but simply on the prohibition contained in the principal entail, " and on the disability thence arising to alter the terms of the " entail or the order of succession. Now, there the prohibition " was not fortified by any irritant clause; and upon looking at " the written pleadings, I perceive, that the circumstance was " brought distinctly under the notice of the Court; and yet it " never seems to have been doubted, that whatever might be the " merits of the defence on other grounds, a prohibition required, " in a question *inter hæredes*, no irritant clause to render it bind- " ing; and, accordingly, the Court decerned in terms of the " libel. It seems impossible to evade the application of these " cases to the present question. Both of them are instances of " the competency of reduction at the instance of an heir, founded " on a prohibition without an irritant clause. And, in so far as

" the last case turned upon the express alteration of the order of " succession, it is a case absolutely identical with the present.

" On these grounds, it does humbly appear to me, that the " question put to us must be held to be determined in the affirma- " tive, not only by the concurring authority of all our institutional " writers, but by an uninterrupted series of decisions.

" It only remains to be considered, whether those authorities " have been shaken by some of the later cases referred to on the " part of the defender. In considering these cases, I am disposed " to throw out of view entirely those of Sharpe against Sharpe, " decided in the House of Lords, 18th April, 1835, and that of " Speid, decided in the Court on 21st February, 1837. In the " first case, the only question was the sufficiency of the irritant " clause against acts of contravention. The House of Lords " held, reversing the judgment of the Court, that there was no " good irritant clause; and in the words of the judgment, as " appearing in the report, it is declared, that the deed of entail is " not sufficient to prevent the appellant from selling, disponing, " or contracting debt, '*or from gratuitously alienating or dis-* " '*posing of the same*,' being the acts that are described in the " summons. It would appear, however, from the report, that " this last point, as to gratuitous deeds, was neither raised in the " arguments nor considered in the opinion of the learned Lord " who moved the reversal; and it also appears from a note in a " later case, that of Strathbrock, Robertson's *Reports*, 16th " August, 1839, that these expressions in the judgment had been " inserted from inadvertency. This I must hold to be confirmed " by the very remit in the present case; as, if that judgment had " been understood to express the judicial opinion of the Court of " Appeal, I do not see how the present question ever could have " been submitted to us.

" The case of Speid against Speid, is one of the same kind. " The summons, founding on the defect in the irritant clause, " included no doubt the alleged power of the pursuer to execute

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" gratuitous as well as onerous deeds, and the Court decerned in " terms of the libel, and thus, in form at least, supported the " one power as well as the other. But the whole argument " related to the sufficiency of the irritant clause. The Court " found that the prohibitions are not guarded in terms of the " statute, so as to constitute a valid and effectual entail, and " *declared in terms of the libel*,—their attention not having been " directed, either in the argument or in the opinions of the " Court, to any distinction between onerous and gratuitous deeds. " In these circumstances, I do not consider either of those cases " to be substantially judgments on the point in dispute.

" The whole difficulty arises from the cases of Ascog and " Bruce, decided in the House of Lords, on 16th of July, 1830. " And it is unquestionable, that the rejection of the argument of " the respondents in those cases is, to a certain extent, unfavour- " able to the present pursuer. Because, from the very nature of " those arguments, the judgment *in favour of* them would have " formed an authority *a fortiori* in favour of the present pursuer. " But it does not follow that the judgment in those cases, " though to that extent unfavourable, was necessarily an autho- " rity against him on the point now raised. On the contrary, it " rather appears to me that those judgments did not necessarily " affect the present question. This opinion is, of course, ex- " pressed with the most perfect deference to the Court of Appeal, " who are of course the best judges of the true principles of the " decisions which were pronounced by them. I can only say, " that considering the point at issue in the case of Ascog and " Bruce, and the grounds of the judgments as appearing in the " report, I should not feel myself authorized to hold that those " judgments did decide, or were intended to decide the question " that has been put to us. That they did not do so directly is " clear; whether they did so by any necessary implication, is a " fit subject of inquiry.

" In the case of Ascog, the entail was defective, both in the

" irritant and resolutive clauses, against selling; in that of Bruce, " in the resolutive clause. There could be no doubt, then, of the " *power* of the heir in possession to sell; and, accordingly, in the " question with the purchasers, the sales in both cases were ulti- " mately sustained. In both cases the expectant heirs raised " declarators founding on the prohibitory clause, and concluding " that the party who had sold should, in the event of the sale " being sustained, be bound to reinvest the price in new pur- " chases, to be settled in terms of the original entails. It is " evident that the condition of the argument on both sides there " was, the power of the heir in possession to sell, and the conse- " quent inefficiency of the alleged obligation to secure its own " appropriate performance. And this drove the parties demand- " ing the reinvestment to the necessity of maintaining the very " nice distinction between the rights of heirs and the rights of " onerous purchasers in regard to the identical subject of obliga- " tion. It was maintained, that though the obligation was " invalid to the effect of preventing a sale, it was still valid to " the effect of enabling the expectant heirs to compensate them- " selves, by insisting on the reinvestment of the price, the substi- " tute for the lands sold in the hands of the seller. The Court " of Session gave effect to this distinction, and while they held " the sales to be good to the purchasers, they held the sellers in " both cases bound to reinvest; and those judgments were " reversed by the House of Lords.

" Now it is clear enough, that if the judgments of the Court " of Session had been affirmed, there would have been an end to " the present question; because those judgments directly sus- " tained the obligatory effect of the prohibitory clause *inter* " *hæredes*, independently of the irritant and resolutive clauses. " But the converse of the proposition is not necessarily true. " We must look to what effect and under what circumstances " the bare prohibitory clause was there pleaded, in order to see " how far those judgments bear upon the present case. Because

" it does not necessarily follow, from the inefficacy of the mere " prohibitory clause to support the special ground of action in that " case, that it may not be effectual to sustain a ground of action " entirely different. Now, it appears to me, that it was pleaded " in those cases, to an effect and under circumstances essentially " different from those which hold in the present. It was there " pleaded, as a ground of claiming compensation, as it were, for " the breach of an obligation, which obligation the heirs of entail " confessedly could not compel the alleged contravener to per- " form, by annulling the sale. And the main argument on the " part of the appellants in that case was, that the proper test of " the existence of an obligation was the competency of preventing " its violation: that a prohibition against selling, without irri- " tant and resolutive clauses, which, by the admitted terms of " the argument on both sides was of no avail, and not binding in " regard to its only object, a prevention of sale, must be treated " as constituting no obligation at all. That argument was suc- " cessful, and thus the point was clearly fixed by the judgment of " the House of Lords, that a prohibition *against onerous trans-* " *actions*, if not secured in terms of the statute, constitutes no " obligation even *inter hæredes*, to the effect of compelling the " contravener to indemnify the expectant heirs.

" That principle was enough for the decision of the case before " the House of Lords. It was not necessary to go beyond it; and " it does not appear to me, from the report of the opinion of the " noble and learned person who moved the judgment, that it was " intended to go beyond it. Thus the Lord Chancellor, Eldon, " 4 *W.* & *S.*, 222, gives the import of the claim of the respon- " dents in the following terms:—' The deeds of entail apply no " ' irritant or resolutive clause against selling. *The deed, therefore,* " ' *admits of an effectual sale;* but the author of the deed, without " ' expressing that such shall be the effect of a sale, is *understood* " ' *to mean that of which he has not said one word, viz., that if the* " ' *heir does sell he shall buy another estate with the price, and so sell*

" ' *and buy as often as he pleases to sell and buy.*' Again, (p. 223,)
" —' It is for your Lordships to judge whether clearly settled
" ' law *exposes the heir selling to such liabilities, and nevertheless*
" ' *leaves him entitled to such liberty*, and that you are bound to
" ' imply that the author of the entail meant to impose an ex-
" ' press condition by the deed, and instead of enforcing the
" ' observance of it as he enforced the other provisions, by irritant
" ' and resolutive clauses, that he relied upon some supposed
" ' clearly settled law to *do what he might have directed by this*
" ' *deed, but as to which he is perfectly silent, namely, from time to*
" ' *time, upon every selling, to require the heir to buy again and*
" ' *entail to the same uses*,' *&c.* A great many other passages
" might be quoted to the same effect. No doubt there are passages
" which refer to the statute, and the irritant and resolutive clauses
" there authorized, as the test of the existence of the obligation
" even *inter hæredes*. Thus, after quoting the statute, the report
" proceeds, 4 *W. & S.*, 229 :—' The language of this statute seems
" ' therefore to import, that the Legislature was not only ordaining
" ' a law for the benefit of creditors and other singular successors,
" ' but also a law which was to operate between and for the
" ' benefit of heirs.' But then it must be recollected that these
" expressions are to be construed, with reference to the only
" point which was before the Court of Appeal, viz., the possibility
" of the existence of an obligation *inter hæredes*, which obliga-
" tion required, from its nature, and the terms of the statute,
" irritant and resolutive clauses, in order to render it an obliga-
" tion at all; according to the test which seems to have been
" assumed as the true one, namely, the possibility of preventing
" the actual completion of the prohibited act.

" The judgment, then, as might be expected from the nature
" of the case, went no farther than this, that a prohibition which
" did not extinguish the heir's *power* to sell, constituted no obli-
" gation, even *inter hæredes*, so as to enable the expectant heir
" to claim any reparation or substitute for the loss of the estate

" sold. Indeed, I think the speech of the learned Lord is very " guarded upon this matter. Whatever doubts and difficulties " he admits to exist on some of the points argued, he confines " himself strictly to the point at issue, and the whole opinion " seems to me to be qualified by the observation made at the " outset, p. 211. ' When I recollect what passed in the case of " ' Stormont, and what passed in other cases actually adjudicated " ' as to entails previous to the Act 1685,' &c., ' it does appear to " ' me extremely difficult indeed to say that they did not form " ' part of the common law of Scotland, *which at this moment* " ' *ought to be regarded as having effect on the right of persons* " ' *claiming under entails* INTER HÆREDES.' While it seems to " have been expressly admitted, then, that entails might have " effect *inter hæredes*, without the assistance of the statute; the " object of the speech is to shew that they could not have, even " *inter hæredes*, the particular effect concluded for by the expec- " tant heirs in that particular action.

" Indeed, this is the very description of that judgment given " by Lord Chancellor Brougham, in a later case, that of Cath- " cart *v.* Cathcart, July 18, 1836. After stating, ' that the whole " ' current of decisions negative the proposition, that an entail, *if* " ' *void against creditors and other singular successors is necessarily* " ' *invalid as among the heirs of entail,* and *intra familiam,* and " ' on behalf of one substitute against the other,' he proceeds, " ' *the grounds on which the Ascog case was ultimately determined,* " ' *does not break in upon that which I have taken the liberty of* " ' *stating*, that the course and current of authorities is destruc- " ' tive of the proposition, *that if an entail is bad as against* " ' *singular successors, it is bad intra familiam,*' *&c.*

" All that was then decided in the Ascog case, was the in- " competency of the expectant heir demanding reinvestment of " the price, on a sale which it was admitted the prohibitory " clause was not sufficient to prevent. The grounds of that " judgment appear to me exclusively applicable to the case then

" before the Court; being truly rested on the incongruity of " holding an obligation to exist, which, according to the condition " of the argument, was unavailing, and which the entailer did or " ought to have known to be unavailing for its proper purpose; " the incompetency of rearing up by implication, an obligation to " reinvest the price, which the entailer never did or could con- ' template, and had not expressed; the great and inextricable " practical difficulty to which such a construction would lead, " and, above all, the absence of any authority in practice for such " a construction.

" But it must be evident that not one of those *rationes decidendi* " applies to the present case. In the *first* place, so far " from its being admitted as forming the condition of the argu- " ment, that a prohibition of gratuitous deeds is ineffectual with- " out the assistance of the Act 1685, the very question here " raised is, whether such a prohibition be effectual or not? " *Secondly*, This entirely removes the second ground of decision " in the case of Ascog, that the relief there sought *inter hæredes*, " viz., the reinvestment of the price, was one not contemplated " in the entail, and rested merely on implication. Here the " object and effect of the prohibition is not the indirect enforce- " ment of the obligation through a claim of damages, or for rein- " vestment, but its direct enforcement, the appropriate fulfilment " of the obligation by annulling the deed challenged, and thus " restoring the lands to that tenure under which the contravener " was bound to leave them. *Lastly*, so far from there being " any want of authority, we have a mass of authority, both " from institutional writers and the records of our practice, " which it would be difficult to produce in any other branch of " our law.

" It humbly appears to me, then, that the decisions in the " case of Ascog and Bruce are neither directly nor by implica- " tion conclusive of this question. The question, Whether or " not a prohibition without an irritant clause is sufficient to

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" warrant the reduction of a *gratuitous deed*, must be decided on " its own merits, according to the authorities applicable to the " case; and does not appear to me to be affected by decisions, in " which the very essence of the case and foundation of the judg- " ment was, the admitted insufficiency of a prohibition without " irritant and resolutive clauses to warrant the reduction of " onerous transactions: and the consequent incompetency of the " special remedy sought by the expectant heirs, in those particu- " lar actions.

" I have only to observe, in concluding, that holding the " above reasoning to apply in general to gratuitous deeds, I have " the less difficulty in the present case, on considering the parti- " cular nature of the deed in question. It is not an alienation " at all. It is a deed in favour of the granter himself and his " heirs and assignees. If a title had been made up upon it by " the granter in his lifetime, it might have been reduced, as a " violation of the conditions on which he previously held the " estate. He clearly could have pleaded no independent right " whatever as a disponee, disencumbered from the obligations " under which he lay as a disponer; and it is equally clear that " those obligations, if good against him, are equally good against " the defenders, who take through him by service. Unless, " therefore, it could be held that a prohibitory clause was of no " avail whatever, and left the disponer in the situation of one " holding by simple destination, a proposition which seems to be " quite inconsistent with all our authorities, the deed under " reduction must be held reducible.

" Upon all these grounds, I humbly submit as my opinion, " that, even on the supposition made in the question, of the " defect of the irritant clause, the question ought to be answered " in the affirmative: and 'that the entail is otherwise sufficient " 'to exclude or render void the deed under reduction.'

" J. FULLERTON."

" I concur in this opinion.

" H. COCKBURN."

" LORD JEFFREY.—I concur entirely in the opinion of Lord " Fullerton, and should not have thought it necessary to make " any addition to it, were it not to bring under the view of the " Court a very important, though unreported case, in which I was " of counsel along with Lord Moncrieff, in 1816; and in which, " though most anxiously and elaborately discussed in all its pos- " sible bearings, the principle now contended for by the pursuer " was assumed as indisputable, and ultimately given effect to by " an unanimous judgment; and this, it is proper to observe, " after the case of Sir James Stewart had been remitted from " the House of Lords, in March, 1815, for an opinion of the " whole Court on the question, whether an heir who had effec- " tually sold lands under an imperfect entail, might yet be " compelled to reinvest the price, in virtue of distinct *Proki-* " *bitions* against selling—and when all the doubts and difficul- " ties, afterwards brought forward, and acted upon in the latter " case of Ascog, had been fully brought under the view of the " profession.

" The case referred to was that of Grant against Dunbar; " and the circumstances were shortly these. The lands of Eden, " in Aberdeenshire, were entailed in 1713; by a deed containing " distinct prohibitions against selling or altering the order of " succession—*but no irritant clause.* It was therefore clearly in " the power of the heir in possession to sell; and accordingly " Mr. Gordon Duff executed an apparent sale of the property, to " a trustee for his nephew, Major Dunbar, in 1809; and in the " year following Mrs. Grant, as the next substitute, raised an " action against him, concluding first for reduction of the trans- " action, on the ground of alleged erasures and informalities in " the conveyance; but second, and substantially, for damages, " and reinvestment of the price, in case the sale should be found

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" effectual. In the course of the proceeding, however, docu-
" ments were recovered which seemed to make it clear that no
" real sale had been intended, or effected; and that the whole
" transaction was a mere device and contrivance to alter the order
" of succession, and to defeat the rights of the heirs-substitute, by
" the heir in possession, a childless individual of eighty-three
" years of age, conveying the estate to his nephew Major Dunbar
" in fee simple, under colour of a sale, but really gratuitously,
" or only under the burden of certain legacies, amounting but to
" a small part of its real avail. That such was in truth the
" wish and object of the heir in possession, was amply instructed
" by the correspondence and consultations produced: but the overt
" acts by which it was said to be proved that this was the true
" nature of the transaction actually concluded, and on the suffi-
" ciency of which to support that conclusion the whole discussion
" turned, were—1*st*, The alleged inadequacy even of the nominal
" price; being 13,000*l.* for a property said to be worth upwards
" of 20,000*l.*; and, 2*d*, The remarkable fact, that by the arrange-
" ments adopted, no more than 1000*l.* of this price was ever paid
" or meant to be paid to the seller himself; the whole balance of
" 12,000*l.* being lodged in the hands of a trustee, under direc-
" tions to pay the whole of it over to certain legatees of the
" seller, among whom was Major Dunbar himself for a sum of
" 2500*l.*, and his three sisters to the amount of nearly 4000*l.*
" more; the only considerable legacy granted to any one out of
" the nominal purchaser's family, being one of 4000*l.* to the next
" substitute, the pursuer of the reduction herself, and evidently
" intended as a bribe to purchase her acquiescence in the ar-
" rangement.

" When these facts were discovered, the pursuer substantially
" abandoned her original action for reinvestment of the price,
" and instituted a new process of reduction, on the ground of the
" pretended sale being truly a gratuitous alienation or alteration
" of the order of succession, against which the prohibitions of the

" entail were *per se* undoubtedly effectual, and required no aid " from irritant or resolutive clauses; and it was in *this* action "·that the unanimous judgment of the Court, already referred to, " reducing and decerning in terms of the libel, was ultimately " pronounced in November, 1816.

" Now, I observe that the point of law submitted for our " consideration in the present case, as to the sufficiency of mere " prohibitions to annul gratuitous contraventions, was not at all " discussed in the first reclaiming petition for Major Dunbar " against the Lord Ordinary's judgment, though it obviously " was at the bottom of the whole case for the pursuer, and will " not be readily supposed to have escaped attention, when I " mention that this petition extends to no less than fifty-four " pages; and is conjunctly signed by the names of Andrew " Skene, George Cranstoun, and John Clerk. The whole argu- " ment, however, is on *the sufficiency of the evidence* produced, to " show that there was no real sale, but a mere collusive trans- " action of the kind alleged by the pursuer; and in the *second* " reclaiming petition, given in after the Court had unanimously " recognized the relevancy of that ground of reduction, the point " is still more distinctly brought out. The petitioner there says " (p. 23), ' that he does not dispute that, if the pursuer's repre- " ' sentations of the import of the transaction under reduction " ' were supported by evidence, there would be a ground for " ' setting it aside. He has never disputed that if, under pre- " ' tence of a sale, and by a fictitious transaction, to which he " ' (the defender) was a party, Mr. Gordon Duff had in point of " ' fact *merely made an alteration of the order of succession*, such " ' a transaction could never be supported, as an onerous purchase " ' of the property. But what he maintains is, that there is no " ' evidence whatever *of his participation* in the intention which " ' Mr. Gordon Duff had undoubtedly formed, to dispose of the " ' lands contrary to the provisions of the entail,' &c.

" Now, considering that this was the decision, and this the

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" line of discussion adopted, in a case most eagerly contested, in " November, 1816, and when the remit of the Westshiel case " from the Lords was under consideration of the Court, and " indeed amply discussed in the papers to which I have been " referring, I cannot but consider it as the most conclusive proof " of the views then entertained on the Bench and at the Bar, " on the question now again submitted to our consideration, and " as making a very important addition to that long series of " precedents to which Lord Fullerton has already so distinctly " referred.

" I scarcely think that anything need be added, in the way " of commentary or farther illustration, to that clear view of the " object and true meaning of the Act 1685, which Lord Fullerton " has given. And yet I am tempted to observe, that it has all " along appeared to me that it can require nothing more than a " patient and attentive perusal of the several clauses and pro- " visions of that Act, in their natural sequence and mutual " bearing on each other, to arrive at the same conclusion; and " that it is only by either attaching an *absolute* or separate mean- " ing to *relative* expressions, or unduly limiting the reference of " one clause to another, that any difficulty can ever have been " occasioned. Nor indeed am I aware that, till very lately, any " such difficulty has been experienced.

" In construing a short and concise document like this " ancient statute, I take it to be a cardinal rule, or at least a " most useful precept, to read the whole of it consecutively and " together, before seeking to attach a precise meaning to any " particular passage; and if this be done, especially with the " slightest recollection of what I now assume to have been the " antecedent state of the law, I really cannot bring myself to " think that it could occur to any one to doubt that its whole " and sole meaning was to provide, that tailzies should be there- " after effectual against creditors and purchasers, provided they " were fortified by irritant and resolutive clauses,—these clauses

" engrossed in all the titles to the property, and the instrument " containing them recorded in a particular register; but that, if " any of these requisites were omitted, they should be entitled to " no such privilege. This I humbly conceive to be a fair para- " phrase, or, at least, abstract of all that was done or intended " by this statute; and that no other meaning can be put upon " it, except by stopping short in the reading of some of its *con-* " *tinuous* clauses, or mistaking the plain reference of some of " those that follow.

" In reading the introductory or leading clause, for example, " which provides, ' that it shall be lawful to His Majesty's " ' subjects to tailzie their lands,' &c., those who maintain the " construction to which I object, appear to me to stop at the " words I have now cited, as if they could be detached from " those which immediately follow, and then to construe out of " them a declaration, that for hereafter the whole power of tail- " zeing should be held to depend solely upon this statutory " permission. And afterwards, when they come to the clause " which declares, ' that such tailzies shall only be allowed in " ' which the foresaid irritant and resolutive clauses are insert " ' in the titles,' &c., they construe this, not as referring only to " tailzies intended to operate against creditors and purchasers, " but to all and every tailzie which might afterwards be made; " and, in fact, so as to import the absolute nullity of every " settlement upon successive heirs of provision, which was not " guarded by irritant and resolutive clauses.

" Now, it appears to me that both those startling and extra- " vagant conclusions might be avoided,—1*st*, By merely reading " on or through the whole of the first clause, to its natural con- " clusion, and taking it as one simple and continuous provision; " when it would be found to import merely, that, in all time " coming, it should be lawful for His Majesty's subjects to *tailzie* " *their lands with irritant and resolutive clauses*, which should " secure them against creditors and purchasers; and, 2*d*, By

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" giving their plain, natural, and grammatical meaning to the " words of the subsequent clause, which are, *not* (as they seem " sometimes to have been read), that *only such tailzies* should be " allowed (or have effect) as had irritant and resolutive clauses " engrossed in the titles; but, *as the words actually stand*, that " ' *Such* tailzies shall only be allowed when they have those " ' clauses insert in the titles;' meaning, I do not say, merely " probably, but *necessarily* that *such tailzies as had been just* " *before mentioned*, viz., *tailzies with clauses irritant and resolu-* " *tive*, should only be admitted to effect, where these clauses were " duly insert in the register, and repeated in all subsequent titles. " The words, when their whole antecedents, and their own plain " collocation, are attended to, truly *admit*, I think, of no other " construction; and I can scarcely imagine a greater strain and " perversion of very clear expressions, than that by which this " provision of the statute is sought to be transformed into an " enactment, that no tailzie shall subsist to any effect what- " ever, unless it contain irritant and resolutive clauses, duly " engrossed in the titles, and insert in the register. Look again " at the words, and the place they occupy in the statute, and see " whether they can possibly bear such an interpretation. They " come immediately after the full description of the new sort of " tailzies authorized and required by the Act,—that is, tailzies " affected by irritant and resolutive clauses, by virtue of which " it should not be lawful to the heirs to sell or contract debt, " their contraventions should be made null, and their right to the " property forfeited; and then, 'it is declared that *such* tailzies' " (that is, such tailzies as above described) ' shall only be allowed, " ' in which the said irritant and resolutive clauses are insert in " ' the titles,' &c., that is, these new statutory tailzies shall only " be allowed to have these new and extraordinary effects where " the said clauses are so insert or repeated,—a provision obviously " and certainly *inapplicable* to any tailzies in which *there were no* " *such clauses*, and consequently admitting of no such repetition;

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" while the antecedent word *such*, evidently limits the applica-
" tion to the tailzies immediately before mentioned.

" The mere words of the Act therefore are sufficient, in my
" view of the matter, to make this out. But there are various
" considerations which should exclude the opposite construction,
" —even if the words were liable to any degree of ambiguity.

" In the *first* place, the statute is confessedly a remedial or
" *enabling* statute,—and every presumption therefore is against a
" construction which would make it the instrument of *imposing*
" *new disabilities*,—and *creating* evils of the very same kind
" with those which it was passed to remedy. Its object was *to*
" *enlarge* the powers of landed proprietors,—and the evil it was
" intended to remedy was, their previous inability to secure the
" descent of their lands to their heirs of provision, in spite of the
" claims of purchasers and creditors. And yet the effect of the
" construction in question would plainly be, to *deprive* them of
" the power to make a simple tailzied destination effectual
" against heirs at law, while it remained unaltered, or to enforce
" mere *prohibitions* by reduction of gratuitous deeds, without the
" hard necessity of also forfeiting the granters. That these were
" *new limitations* of the powers of landed proprietors, as they
" existed before the statute, cannot well be disputed; and I do
" not think their importance, or the consequent extreme impro-
" bability of its being intended to impose them, have yet been
" sufficiently considered.

" Lord Fullerton has merely hinted, that if all tailzies were
" to be absolutely null, except those which had the statutory
" requisites, a simple destination to heirs not *alioquin successuri*,
" would be ineffectual to exclude heirs at law. But the propo-
" sition, which I take ot be incontrovertible in fact, is worth
" a little more consideration, as it seems to me sufficient of
" itself to exclude the construction against which I am con-
" tending.

" All destinations to heirs of provision, who are not also heirs

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" of line, are *tailzies* by the law of Scotland; and it is from their " containing such a destination, and from nothing else, that they " ever obtain this character, even when fortified by prohibitions " and clauses irritant and resolutive; and destinations of this " kind, especially to heirs male, and to such heirs from various " *stirpes* selected by the entailer, are among the most ancient " and common of our settlements. The power of making these, " too, though liable to be defeated by the act of any heir actually " in possession, has always been highly valued; and as, up to " this hour, they have been uniformly held to be effectual till so " altered; and as it must often happen that the heir in possession " is disposed to respect the investiture under which he has him- " self taken, it could not but appear a most harsh and arbitrary " measure to take away the power of making such settlements,— " and to subject the destination and appointment of the original " owner to be defeated, not by the party actually in the fee of the " property, to whom that owner had left such a power, but by " his *heirs at law*, or heirs portioners, whom it was the object of " the entailer to exclude. Yet if *all* tailzies are to be null, unless " they contain regular prohibitory, irritant, and resolutive clauses, " I do not see how it is possible to avoid this conclusion,—or how, " in short, an heir of provision could ever take in preference to " an heir of line; or the latter be prevented from reducing his " titles, and asserting his own, whenever he was only excluded " by a tailzied destination not so guarded; while it is obvious " that many proprietors who were willing enough to take the " chance of their successive heirs of provision allowing their des- " tinations to stand, might yet think it hard to have them " defeated, not by them, but their unknown heirs at law; and " to be reduced to the alternative of either submitting to this, or " absolutely tying up the hands, *and forfeiting the rights* of the " favoured individuals to whom they had no objection that such " a power should be entrusted. But if this would be the inevi- " table consequence of disallowing all tailzies but those fortified

" by irritant and resolutive clauses, and if no one has hitherto " attempted to give *this effect* to such disallowance, I must con- " clude that the construction which necessarily infers that it " ought to have this effect, must be radically and wholly " erroneous.

" But the case in fact is substantially the same as to tailzies " guarded only by prohibitions. Many proprietors may choose " in so far to ensure the descent of their lands to their own " elected heirs, in their order, who might yet be willing to leave " them the power of onerously burdening or alienating them in " case of necessity; and who might especially scruple *unneces-* " *sarily* to subject these favoured parties to the total forfeiture " of their rights, in consequence of a mere *conatus* at a gratuitous " and perhaps but partial alienation, which admitted of the " milder and equally efficacious remedy of a simple reduction. " Yet to this alternative, according to the construction now in " question, all our proprietors were reduced by the Act 1685; " though passed for the avowed purpose of *enlarging their arbi-* " *trary powers* over their property, and subjecting commerce, " and onerous creditors, to great restraints and disadvantages, in " order that these powers might be so secured and extended. I " think every rule of construction, and every principle of law is " against such a conclusion.

" I will only add, that I have never been able to understand " for *what objects or purposes*, either of general policy or par- " ticular convenience, it has been imagined that such a strange " restraint could have been contemplated by the framers of the " Act 1685. The powers previously enjoyed by landed proprie- " tors, of naming heirs of provision, who would continue to suc- " ceed till excluded by the new settlement of a fiar in possession, " or of guarding their succession by prohibitions, under which " all gratuitous alterations might be reduced, were powers nearly " akin to those which were secured, or for the first time given by " the Act,—while they were liable to no part of the incon-

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" venience or *odium* which confessedly attached to the exercise " of these higher powers. Why, then, should the former have " been abrogated, or merged in the latter? And for what in- " terests, or of what class of persons, can it be supposed that " such a change could have been intended? It would require " very plain words to make me believe in such an intention; " and I confess I can find none which give it the slightest coun- " tenance.

" No illustration, I think, can well be stronger than the case " actually before us. But I shall conclude by stating one which " now occurs to me, and which may perhaps put the extrava- " gance of construing restrictions out of grants of enlarged " powers, in a more familiar, if not a more striking light. Sup- " pose that the provision of the Act of 10th Geo. III., c. 81, " which empowers entailed proprietors to grant *improving* leases " for a term of thirty-one years, had been expressed in the style and " phraseology of the Act. 1685, and had run thus,—' That it shall " ' be lawful to entailed proprietors in Scotland, to grant leases " ' of their entailed lands, and to insert therein covenants bind- " ' ing the tenants to make certain permanent improvements; " ' and that, upon such covenants being so insert, the said leases " ' should be good and effectual to the takers thereof and their " ' heirs, not only for the periods permitted by the several entails " ' of the granters, but also for such longer periods as might be " ' therein expressed, not exceeding the term of thirty-one years " ' from the date of entry; but declaring always, that such leases " ' shall only be allowed where the said covenants are distinctly " ' engrossed in the body thereof, before signing or entering to " ' possession thereon.'

" I think this a fair parallel to the provisions of the Act of " 1685; and I shall merely ask, whether it would enter into the " mind of any lawyer (or other person) to contend that, by such " an enactment the former powers of entailed proprietors to " grant leases *for the terms allowed by their entails*, would be

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" taken away? and all *leases whatever annulled*, which did not " contain the improving covenants, without which the prolonged " terms could not have been supported!

" F. JEFFREY."

" I concur in the opinions of Lord Fullerton and Lord " Jeffrey.

" A. WOOD."

" We concur in the opinion of Lord Fullerton. The only " part of that opinion on which we could have entertained any " doubt was that which regards the extent to which the pre- " cedent of the decision of the case of Ascog in the House of " Lords reached. For we are willing to yield to that decision " as far as it goes, while, in so far as it does not bind us, we have " not changed the opinions we expressed in that case, and concur " with the views of the law of Scotland stated by Lord Fuller- " ton. We are now, however, disposed to think that, whatever " may have been the views entertained by the minority of this " Court in that case, there are no sufficient grounds for holding " that the decision of the House of Lords extended, in the case " of Ascog, further than has been expressed by Lord Fullerton.

" D. BOYLE.
" J. H. MACKENZIE.
" A. MACONOCHIE.
" J. H. FORBES."

" I entirely concur in the opinions of Lord Fullerton and " Lord Jeffrey; and, as those opinions are very full, and very " satisfactory to my mind, I do not think it necessary to enter " into the general argumen .

" I have had occasion to express a similar opinion upon this " which I had always understood to be settled law, in various " cases which have been recently before the Court,—that, where

" there is a sufficient prohibitory clause against breaking the " tailzie, or altering the order of succession, and against aliena- " tions, that is effectual for setting aside all *gratuitous* deeds of " the nature so prohibited, without the aid of any irritant clause. " —Lockhart *v.* Lockhart, May 20, 1841; Earl of Eglinton *v.* " Montgomery, January 22, 1842; and Murray *v.* Murray, " January 28, 1842. And though the point might not be neces- " sary to the decision of the material questions which were " raised in those cases, I did not understand that there was any " difference of opinion on that particular point. In the first of " them, I mentioned, that in arguing the leading question in the " Roxburghe cause, which related to the efficacy of a gratuitous " deed of alteration, Mr. Blair, then Dean of Faculty, and after- " wards Lord President, expressly assumed that the prohibitory " clause alone was sufficient, and that he had no occasion to go " upon the irritant clause at all; and that Mr. John Clark, then " Solicitor-General, on the other side, distinctly assented to the " proposition. I spoke then from very particular recollection. " But I have since found my notes of that argument; and in the " speech of Mr. Blair, I see these precise words set down,—' *In* " ' *question with person taking under gratuitous deed, prohibitory* " ' *clause enough.*' Mr. Clark replied, and granted the point as " incontestable, and neither was there any attempt to dispute it " in the reclaiming petition, or in any later discussion of that " very important cause.

" I was well acquainted with the later case mentioned by " Lord Jeffrey, Grant *v.* Dunbar, finally decided 15th November, " 1816, and can fully confirm Lord Jeffrey's account of it. " There was no *irritant clause* in the entail; and at first the " party, believing that a real sale had taken place, was proceed- " ing on a summons, concluding simply for having the price " reinvested, although the case of Stewart *v.* Lockhart, on that " point, had by this time been remitted by the House of Lords. " But, in the course of the proceedings, the reality of the case

" was disclosed by the recovery of documents which were held " to make it clear that there was no sale, and that the transac- " tion was merely *collusive* and *simulate* for effecting a *gratuitous* " *settlement* of the estate. A new summons of reduction was in " consequence raised; and the deeds and whole transaction were " totally reduced on that ground. In that case, it was assumed " in the argument for the pursuer, that the prohibitory clauses " against altering the order of succession 'are undoubtedly effec- " ' tual to prevent all *gratuitous deeds* to the prejudice of the " ' heirs of entail.' And in the long reclaiming petition against " the first judgment of the Court, signed, as that was, by three of " the highest names at the Bar, there was no attempt to contro- " vert the proposition. The case was argued and decided as " depending entirely on the question of fact, whether there was " a real sale, or a simulate transaction for altering the succes- " sion; on the clear basis that, if it were of the latter descrip- " tion, the prohibitory clause was sufficient to sustain the reduc- " tion. It is not reported,—only, I presume, because the *law* " was held to be so clear, that the case resolved simply into a " question of *fact*.

" In addition to the other authorities referred to by Lord Ful- " lerton, I observe that, in the notes on *Stair*, attributed to Lord " Elchies, the author, p. 110, in speaking of the effect of 'an " ' express obligement *not to alter* nor to contract debts, and how " ' far the maker or any of the heirs of tailzie can make any " ' deed to evacuate the succession,' lays it down *substantively*,— " ' And, in the *first* place, it's *agreed*, and *very justly*, by the " ' author (Stair), that it *cannot be altered by any gratuitous* " ' *deed*, and that such a deed would be reducible on the Act " ' 1621.' This he holds decidedly as a *settled* point; though " he goes on to speculate on the very *different* question, what " shall be the effect of such an obligation in the case of *sales* " being made, or other *onerous* deeds granted, where it is not " fortified by irritant and resolutive clauses, in consequence of

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" which the deeds are effectual in all questions with singular " successors. It is evident, that it did not appear to him that " there was any connection between these two questions.

" I am very clearly of opinion, that the judgments pro- " nounced by the House of Lords in the cases of Ascog and " Bruce, ought not to have any effect to lead to the conclusion " here maintained on the part of the gratuitous donee. The " principles on which those cases were decided, by the great " lawyer who then presided in the House of Lords, have not, in " my humble judgment, any tendency to impeach the general " rule of the law of Scotland as to the effect of a clear prohibi- " tory clause to prevent *gratuitous* deeds. But the distinction is " so clearly explained by Lord Fullerton and Lord Jeffrey, and " was indeed so emphatically taken by Lord Brougham in the " case of Cathcart, that I think it quite unnecessary for me to " enlarge upon it. To state it shortly, it just comes to this: In " the one case, the entail has failed altogether in its purpose; " the deed of sale or eviction *has taken effect;* the *only estate* " *entailed is gone*, and cannot be recovered; and the entailer has " given *no remedy*. In the other, the estate remains entire in the " hands of a *gratuitous* donee, representing universally the heir " of entail bound by the prohibition; and the simple question is, " whether such a *gratuitous* donee can be allowed to take it " from the heirs of entail, by virtue of a deed which is in viola- " tion of the *conditions* of his author's title.

" JAMES W. MONCREIFF."

" LORD CUNINGHAME.—When the present case was discussed " before me as Ordinary, prior to the appeal, I ventured to ex- " press an opinion, that the disposition libelled on was reducible " as a *mortis causa*, gratuitous and undelivered deed, granted by " an heir of destination to the prejudice of the posterior sub- " stitutes.

" The grounds on which such deeds have been held chal-

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" lengeable in our law, are now so perspicuously detailed in " the opinion of Lord Fullerton, that I have only to express " my entire concurrence in it, and to submit a few additional " considerations and authorities in support of his Lordship's " views.

" It has been, I conceive, demonstrated satisfactorily in the " opinion referred to, that the efficacy of a settlement with a " substitution of heirs, and a prohibitory clause to bar alteration " of the succession, does not rest on the Act 1685, but on prin- " ciples of common law and equity,—recognised in the law and " practice of Scotland from the earliest period.

" When a party takes an estate under a settlement, contain- " ing a substitution of heirs with a prohibition against alteration, " he comes under a legal obligation not to alienate the estate by " any gratuitous deed in favour of his own heirs, to take effect " only after his own death. The rules of common justice and " good faith forbid him to reject the condition on which the gift " was conferred.

" On that principle it was held, long before the Act 1685 " was thought of, that whatever right an onerous disponee might " acquire to a tailzied fee, from a substitute in possession, at all " events no party could defeat the right of posterior substitutes " by a *gratuitous* deed, placing heirs named by himself in the " room of those appointed by the maker of the principal settle- " ment, when he had expressly prohibited alteration. The " estate might be attached by creditors,—or the heir might " make an extrajudicial sale, to take effect *inter vivos*, which " would involve him in no responsibility to the substitutes, as it " is presumable that, when the entailer inserted no irritant or " resolutive clause in his grant, he meant to leave the estate " substitute to the *onerous* deeds and debts of the heir in posses- " sion. But the case is entirely different when the estate is " *extant* and unsold, and when the substitution guarded by a " *prohibition* against alteration, is attempted to be defeated by

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" the *mortis causa* settlement of an heir who has himself ac-
" knowledged the original grant, and taken benefit under it.

" It is supposed that an alienation of that description would
" be annulled by our law, even when *personal* property is the
" subject of a special destination.

" Take the case of a *sum of money* invested in the public
" funds, or in bank stock, or in any other establishment of
" deposit and investment, and that it were conveyed first to the
" favoured legatee, with a destination in the event of his death,
" before or after the testator, to a second and third substitute in
" their order, with a declaration that in case of the death of the
" primary legatee, without uplifting or onerously burdening the
" fund, it should go to the posterior substitutes in their order, or
" their issue surviving,—the law, it is apprehended, would
" enforce such a destination, and prefer the substitutes of the
" original testator to the *gratuitous* legatees of the prior substi-
" tute, at least so long as the fund was extant, and invested in
" the security conveyed by the settlement.

" But that is not a mere hypothetical case. Many questions
" arose on bonds for money, made payable to a series of substi-
" tutes, at an early period of our law, and, at all events, prior
" to 1685.

" Thus, the case of Grahame against the Laird of Morphie,
" in 1673, is reported under this summary in the *Dictionary*
" (p. 4305):—' A bond of provision was granted to children in
" ' these terms,—" That in case they died unmarried or within
" ' year and day thereafter, that the sum should return to the
" ' granter's heir, and that they should make no assignation or
" ' other right in defraud of his heir." This clause was found to
" ' import that the children could do no *gratuitous* deed, but
" ' that it did not hinder them to uplift for necessary causes.'

" In 1674, the summary of the decision in the case of Drum-
" mond against Drummond (p. 4306) is to the following effect:—
" ' A bond payable to the creditor and certain heirs of tailzie

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"'contained this clause, that it should not be lawful for the "'debtor to make payment without consent of one of the heirs "'of tailzie. Payment being made without such consent, the "'same was found unwarrantable: and the debtor was ordained "'to grant another bond in terms of the former, without pre-"'judice to the creditor, to declare in a process that the sum "'should be affectable by his creditors, or be disposed of by him-"'self for his necessary uses.'

"To these may be added the following cases to the same "effect, reported under another section of the *Dictionary*:— "Stewart, 24th June, 1669 (*Dict.*, p. 4337); Drummond in 1679 "(p. 4338); Scot, in 1683 (p. 4341); College of Edinburgh, "in 1685 (p. 4342).

"As a contrast with the preceding cases, reference may be "made to that of Strachan and Barclay, in which the species of "alienation sufficient to affect a destined fund, was clearly defined. "Colonel Barclay had granted a bond to his nephew James "Sinclair, for £900 Scots, on which the granter's son (Robert "Barclay the Quaker), having been sued, 'the Lords found, "'though the bond expressly secluded Sinclair the creditor's "'*assignees*, and was provided to return to the *debtor*, in case "'Sinclair the creditor should have no children lawfully begot, "'yet he might assign it for so *onerous* a cause as the payment "'of his aliment, as he might have uplifted it, or his creditor "'might have affected it; and therefore, before answer, ordained "'them to condescend and prove how long and by whom he was "'alimented.' The proof failed, and Barclay was afterwards "assoilzied; but the case appears to have been discussed with "some interest at the time, as sufficiently appears from Fountain-"hall's curious report of the final discussion.—See *Dictionary*, "p. 4311—12.

"If these, however, were the rules which governed the suc-"cession of tailzied *funds*, it is obvious that they are still more "applicable, and entitled to effect in settlements of *land*. There

" is certainly no reason why a destination of land should be less " protected than a similar provision of a personal fund. Accord- " ingly, Lord Fullerton has adverted to the decisions since the " Statute of 1685, which sufficiently attest, that prohibitions " inserted in tailzies or destinations of land, not so completed " according to the Act 1685, as to be effectual against creditors " and purchasers, have nevertheless been uniformly held sufficient " to bar *mortis causa* settlements by the heir in possession. The " following decisions of date prior to those quoted by Lord " Fullerton, show how early and general the impression was, that " no *gratuitous* settlement of land, contrary to a subsisting " investiture, in which alteration was prohibited, could be sus- " tained. Thus the case of Drummond in 1636, collected by " Durie, is reported in the *Dictionary* under the following sum- " mary (p. 4302):—'A person being decerned by decreet-arbitral " ' to tailzie his lands to another, after expeding charter, and " ' taking sasine in terms of the charter, sold the lands to a third " ' party; the sale was sustained, in respect the decree-arbitral " ' bore *no prohibition* against selling, and no *fraud* on the part " ' of the seller was qualified.'

" The next case (Binny against Binny, in 1668, *Dict.*, p. 4304,) " is thus abbreviated:—'A woman bound herself to resign certain " ' lands in favour of herself, and the heirs of her body; whom " ' failing, in favour of her brother, and to do no deed in prejudice " ' of his succession. After inhibition was served on this deed, " ' she married, and disponed the lands to her husband. This " ' disposition was *reduced*, as being in prejudice of the brother's " ' succession.' It is evident that that decision was questionable, " as, in later cases, a disposition by a bride to her intended " husband, on an antenuptial marriage-contract, has been held to " be *onerous* in respect of the provisions accruing to herself, on " the completion of the marriage. That, however, does not affect " the principle of the old decision, when that species of alienation " was viewed as gratuitous.

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"At a period somewhat later, in 1717, the following case "occurs in the *Dictionary* (p. 4343):—'Part of the family estate "'of Douglas being given away "to the heir of a second "'marriage, and the heirs of his body; which failing, *to return* "'*to the right heir* of the family of Douglas," it was found, that "'this estate *could not be gratuitously alienated* in prejudice of "'the clause of return, it being argued, that here the proprietor "'was giving away an estate from his successors for a special "'use, in which this reasonable condition is implied, that, when "'the use is at an end, himself or his heirs should have back "'the estate.'

"It is unnecessary, however, to multiply the citation of cases; "they are all, *without a single exception*, to the same effect, "rejecting gratuitous alienations by *mortis causa deeds*, which is "truly just a new and voluntary substitution of heirs by a sub-"stitute, to the prejudice of a subsisting and unexhausted desti-"nation.

"Upon these precedents, and on the principles of law on "which they are founded, every institutional writer, for nearly "two centuries,—from Sir George Mackenzie to Professor Bell,— "all concur in holding that a disposition, with prohibitions, is "effectual to bar gratuitous alienations. The quotations from "the works of Sir George Mackenzie (whose *Institutions* were "published about 1680) and from Lord Stair, Bankton, "Erskine, and Mr. Sandford, being all cited at length in the "case for Mr. Carrick Buchanan, (p. 12—16) are so complete as "to supersede any repetition here. There never was a point "more completely settled and put to rest in the law of any "country, by the consentaneous opinions of all the institutional "writers, than that now under discussion. The legal doctrine "applicable to the whole case is clearly and accurately condensed "in the words of Professor Bell (*Principles of the Law of Scot-"land*, published in 1839, page 620),—'The form of an entail,' "says he, 'with such prohibitions and restrictions, is not different

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" ' from that of any other settlement of land; the conditions and
" ' destinations, the prohibitions and the irritancies, being clearly
" ' expressed. The effect is either against *heirs*, or against *third*
" ' *parties*. The former depends on the expression of the deed,
" ' and the *principle, that the acceptance of a conditional gift*
" ' implies an obligation. The latter depends on due compliance
" ' with the requisites *of the Act*.'

" It is quite unnecessary to add anything to the exposition
" given by Lord Fullerton as to the origin and object of the Act
" 1685, here referred to by the learned Professor. That statute,
" looking to the age in which it was passed, was devised to
" gratify the feelings of proprietors for the permanency and
" hereditary transmission of their estates, and, with that view,
" clauses were framed to protect them from attachment by, and
" alienation even to onerous creditors. From the Scots system
" of land rights, however, and particularly from the registration
" of all titles of property, and of heritable securities, established
" with us since 1617, it was a matter of great legal difficulty to
" place an estate beyond the reach of creditors and purchasers.
" That was at last effected by the registration of tailzies with
" irritant and resolutive clauses, voiding the right both of *creditors*
" and proprietors who contravened the clauses of the entail. But
" that statute neither did give, nor was meant to give, any privi-
" lege to *gratuitous* rights, especially when granted by *mortis*
" *causa* deeds, which they did not enjoy before. There were no
" considerations of public policy which rendered it necessary to
" change the old law as to them, and to give a more extended
" effect to gratuitous and testamentary rights, than previously
" belonged to them at common law.

" It is not surprising, with reference to a question depending
" on principles of law and equity, so clear in themselves, and
" ruled by such a host of authorities early and late, many of them
" prior to the Union, that few examples should occur, of any
" appeal to the House of Lords, of modern date, as to the effect

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" *inter hæredes* of destinations fortified with prohibitions. The " whole lieges, soon after the Revolution, seem to have acquiesced " in the doctrine of the Courts and institutional writers on this " point, that a destination, accompanied with a prohibitory clause, " could not be defeated by a *mortis causa* settlement, executed by " any of the earlier substitutes. The only case carried to the " House of Lords, in which that point seems to have been argued " among other pleas, is that of Don, a question which excited " great interest in its day, reported in Mr. Robertson's *Appeal* " *Cases*, p. 76. In that case an entail of the estate of Rutherford " had been executed at desire of Sir Alexander Don, the pur- " chaser thereof, (prior to 1685), under the *same* conditions, " provisions and limitations, as were contained in a prior *entail of* " *the estate of Newton*, also executed by Sir Alexander. The son " and heir under that tailzie made a new entail, with all the " proper clauses, in favour of a different series of heirs; and the " institute under that last tailzie attempted to defend it on the " ground that the first entail, being a mere tailzie *by reference*, " and not having the clauses *verbatim* inserted in the record, was " null. But the Court, viewing that as a question *inter hæredes*, " found that ' the fee was so qualified in the person of the son, " ' that he could not *gratuitously* alter the order of succession; " ' and therefore decerned in favour of the respondent.' That " judgment was *affirmed* on appeal, 14th July, 1713.

" The preceding case is an important authority in this dis- " cussion, as the entail was such as to be quite insufficient " against *onerous* creditors; it having been found in the case of " Garnock, a few years afterwards, (28th July, 1725; *Dict.*, p. " 15,596), that a *general reference* in an heir of entail's sasine to " the prohibitory and irritant clauses, as recorded in the former " charter and infeftment '*is not sufficient to interpel creditors*, " ' *according to the Act* 1685.' But the Rutherford entail, though " ineffectual against creditors, was sustained in this Court and " the House of Lords, as against *gratuitous* disponees.

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" Since that period, it does not appear that any case involving " a claim by a gratuitous disponee, to the prejudice of the substi- " tutes under a destination prohibited to be altered, was brought " under review of the Court of Appeal. The case of Ure and the " Earl of Crawford, in 1756, was *not* appealed. It is apprehended " that the very absence of reported cases affords incontestable " proof of the universal acquiescence and understanding of the " country, in the doctrine laid down by all the authorities, on this " question of constant and daily occurrence in practice.

" But although there have been few cases since the Union in " which any party has claimed a right openly to defeat a subsist- " ing destination, protected by a prohibition against alteration, " by a gratuitous deed to take effect *inter hæredes*, it humbly ap- " pears to me, that the acknowledged incompetency of such " alienations has formed one of the chief grounds for a rule in " the law of title, now firmly established in a variety of well- " contested questions. I allude to the determinations in cases of " *double title*. When parties, having *two* titles in their person " to the same estate, one entirely *unlimited*, and another more or " less *limited*, as the case may be, it has been long settled that, " in the case of two unlimited titles, the party is held as possess- " ing on both; but if one be limited, (even when the restrictions " fall far short of a strict *tailzie*), and the other unlimited, the " possession is ascribed to the investiture in fee-simple only, so " as to extinguish the limited title by prescription, whereby the " right of all those who, before the prescription has run, might " have been entitled to claim under it, is cut off. It is well " known that the law, in that class of cases, has been established " by decisions both of this Court and the House of Lords no " longer open to question.

" Thus the case of Douglas of Kirkness against Belches, in " 1753, is reported under the following summary in the *Dic-* " *tionary* (p. 4350):—'A charter was granted, containing a " ' *clause of return*. A subsequent charter (one of renewal of

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" ' the investiture only) was obtained without limitation (*i. e.*,
" ' omitting the clause of return). The estate was possessed on
" ' the latter unlimited title for more than forty years, by the
" ' person who was heir to the original limited right. He was
" ' found to have acquired an unlimited fee.' And that decision
" was *affirmed* in the House of Lords.

" Now, on what ground could that decision proceed? The
" limited title, there presumed to be extinguished, was not a
" title constituted by *strict tailzie*, but it was a simple grant,
" containing a clause of *return*, a limitation, notoriously ineffec-
" tual against third parties onerously contracting, but imposing a
" valid restraint against *gratuitous* alienations, by heirs pos-
" sessing under the original grant. That was considered a limi-
" tation fit to be wrought off by prescription. Almost con-
" temporaneously with the preceding decision, it was found,
" that ' a clause of return in a vassal's charter *is not good against*
" ' *an onerous purchaser.*' (July 31, 1759, Johnston against
" Marquis of Annandale, *Dict.* p. 4356). Hence the titles held
" to be extinguished by prescription generally contained restraints,
" only effectual against *gratuitous* settlements by heirs in pos-
" session. The present case is analogous, as the question here
" turns on a prohibition against alteration of the order of
" succession, proposed to be held in operation against *onerous*
" alienations, from defect of an irritant clause, while the des-
" tination and prohibition are alike clear and incontestable.

" The case of Douglas has been sanctioned by a long train of
" decisions uniform in their import and effect. The converse
" of Douglas's case had been decided a few months before, in the
" well known case of Smith against Bogle and Gray, reported
" by Lord Kilkerran (*Dict.* p. 10,203), which is still held of the
" highest authority in practice. It was there determined, that
" when a party and his predecessors have possessed on two titles,
" both equally *unlimited*, his possession must be ascribed to *both*.
" And on that principle the case of Durham was decided in this

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" Court in 1803, and the decision affirmed in the House of Lords " 5th March, 1811.

" The latest case on the subject is that of Paterson and " Campbell, decided in the House of Lords in 1823 (1, Shaw's " *Appeal Cases*, p. 101), where an imperfect entail, prohibiting " alteration of the order of succession, but wanting an *irritant* " clause, was held to be extinguished by a different settlement " made by one of the heirs, which was followed by possession *for* " *the years of prescription*. The latter settlement, however, was " evidently sustained, solely in respect of the *prescription*.

" According to the plea of the appellant, however, in the " present case, these decisions proceeded upon a needless and " false apprehension; if a *gratuitous* settlement may be made by " any heir in possession under every limited title, short of a " strict tailzie, he has already all the rights of a fee-simple pro- " prietor. The appellant's proposition appears to be, that no " prohibition, however express, against alteration of the order of " succession, if not fortified by the irritant clause of a regular " entail, can prevent an heir from transmitting an estate *gra-* " *tuitously* to his own heirs, in preference to other substitutes " appointed by his author. In that view, he does not require the " aid of *prescription* to give him all the rights of the most unlim- " ited proprietor. His alienation is as good before his fee-simple " title is fortified by prescription as after it. It is apprehended " that this is a doctrine as much at variance with the whole " authorities in the law of Scotland as it is with the universal " understanding and practice of the country:

" It appears to me equally clear that the question is not ruled " by the decision in Ascog;—in fact the present is the converse " of that case. In Ascog, the estate, from the defect or peculiarity " of the entail, was permanently and effectually alienated to an " *onerous purchaser*, whose right, on public and statutory grounds, " could not be disputed. Hence it never could be vindicated *in for-* " *ma specifica*. The Court of Appeal, therefore, held that damages

" could not be awarded for an act which the entailer had left it " in the power of the heir for the time legally to perform,—while " the sum claimable could never be again secured to the heirs of " entail, in such a manner as to be beyond the reach of new " creditors. None of these considerations apply to the case of an " estate still unalienated, and attempted to be conveyed away " *gratuitously*, in the face of a direct prohibition by the maker of " the original settlement.

" It is true that the prohibition here is not accompanied by " an *irritant* clause, because such a clause is only required by " *statute* to exempt an estate from *onerous* acts and deeds of the " heir; while at common law no irritant clause is necessary to " secure a prohibition against *gratuitous* or fraudulent alienation. " If the estate should be sold for an *onerous* cause, the seller will " not be liable in damages for using a right left open to him by " the granter. But it does not follow that a *gratuitous* deed " must be effectual because an *onerous* one would have been " unchallengeable.

" In every view, therefore, which I can take of the present " case, I concur in the opinion of Lord Fullerton, on the following " grounds:

" 1*st*, The attempt of any heir of destination, where alteration " is prohibited, to defeat the right of posterior substitutes, by a " *gratuitous* and *undelivered* deed, to take effect only after his own " death, seems to me to be contrary to principles of common law " and equity, entitled to the utmost regard in the adjudication of " such rights.

" 2*nd*, The invalidity of *gratuitous* settlements by heirs pos- " sessing on similar titles with that under which the defender's " predecessor took up the estate now in question, has been fixed " from the earliest period of our law, by a series of authorities, of " unusual number and uniformity, - which it would neither be " just nor safe for a court of law now to depart from.

" 3*rd*, The determination in the case of Ascog, having been

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" pronounced upon an entirely different question and state of the " fact from that which here occurs, affords no rule or even analogy " for the decision of the present case.

" J. CUNINGHAME."

" LORD IVORY.—I concur in opinion with Lords Fullerton, " Jeffrey, and Moncreiff; but perhaps one or two remarks may " not be altogether useless in the way of further illustration.

" As a fundamental proposition, it cannot, I think, be dis- " puted that the Statute 1685 ' makes no alteration in our common " ' law with respect to the transmission of land property' (Kaimes's " *Elucid.*, art. 42, p. 345). A man may still convey his estate " simply or *sub conditione*. And if *sub conditione*, the condition, " if not illegal in itself, will be binding upon the party who " accepts subject to the condition, and upon the heirs and repre- " sentatives of that party, in so far as the law holds them gene- " rally liable for his obligations.

" It is a different question whether the condition, thus effec- " tually imposed upon the grantee and his representatives, shall " likewise be operative and effectual as against third parties, " strangers to the grant, and over whose conduct and rights the " granter had no power. But if the condition, lawful in itself, " be such also as the law holds capable of being imported into the " grant as a *real quality* of the right,—and if, moreover, it be *de* " *facto* in due and competent form perfected into the full measure " of such *real quality*,—it will in that case, as is familiar to every " conveyancer, be operative and effectual even as against third " parties.

" This distinction,—between what is *in obligatione tantum*, " and so to be enforced only through the *persons* liable in the " obligation,—and what has already passed into completed *real* " *right*, and so stands good against all and sundry, even onerous " third parties *extra corpus juris*,—enters deeply into every ques- " tion connected with the transmission of land titles at common

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" law. It forms a not less important element in considering the " question more immediately here in hand, viz., whether the con- " ditions of entail,—though they have not passed into an abso- " lute and completed *real right of entail*, which shall be good " even as against creditors and purchasers,—may not yet be effec- " tual, as affording unquestionable ground of *personal obligation* " against the heirs themselves *intra familiam*.

" The very discrimination, which has constantly been made " between what are termed *strict* entails and those of a *less perfect* " description, proves how little it has entered into the contempla- " tion of lawyers to hold,—that no species of entail could avail *to* " *any effect* except the former,—or that a deed conceived in favour " of a certain series of heirs, and imposing upon these heirs, as they " respectively come to succeed, certain obligations *as the condition* " *of their right*, should have no effect whatever, even *inter hære-* " *des*, unless the statutable formalities of the Act 1685 had also " been rigorously attended to. There are many conditions to " which the enactments of that statute would have no application. " But, independently of this, it has passed into a sort of proverb, " to speak of the remoter heirs, whose interests would be affected " in cases of mere *prohibition*, or other *personal condition*, as being " '*creditors among heirs*, though but heirs among creditors.'

" Accordingly, what gave rise to the Statute 1685 itself, was " not any difficulty of dealing with the legal effect of such condi- " tions, as in a mere question *inter hæredes*,—but the difficulty of " converting what was undoubted matter of personal obligation " binding upon these heirs, into matter also of *real right* qualify- " ing the extent and character of the estate itself, and so entering " into and becoming parcel of the radical title or investiture, in a " question with onerous third parties.

" The notion was, that it was, somehow, inherently incompa- " tible with the very nature of *dominium* or property, that one " should be proprietor, and yet that his deeds executed in that " character should not be operative, so far at least as the estate

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" and third parties were concerned. That the proprietor might, " *while he remained so*, create *real securities* or other *burdens* over " his estate,—or constitute *real faculties*, more or less directly, " enabling third parties to exercise powers affecting it,—and that " these, when duly feudalized, and the infeftments registered, " would be effectual against all the world,—was never doubted, " any more than that from the plenary estate of fee, there might " be carved out limited or subaltern estates of *liferent*, *trust*, *feu*, " *servitude*, &c. The difficulty was,—after the death of the pro- " prietor, who could do all this, while he was himself alive,—to " tie up the hands of *his successor*, from exercising in his turn the " same ordinary attributes of proprietorship. This it was, in the " first instance, attempted to effect,—in aid of the ordinary pro- " hibitions and conditions, (the efficacy of which was never " called in question as matter of mere obligation,) by the intro- " duction of irritant and resolutive clauses. And in the case of " *Stormont* the contrivance was held successful. But still the " doubts which hung over the matter as a mere *common law* " *remedy* were not allayed:—And hence it was that the aid of " *statute* was called in, to confer the necessary enabling powers, " and so put an end to all the hazards and perplexities which " must otherwise have continued to prevail.

" It is very plain, however, that this,—which was wholly " unnecessary, except as a cure for one particular evil,—did not, " and could not touch what had till then been attended with " neither doubt nor danger. The statute was directed to legalize " the creation into *real rights* of certain limitations upon the " rights of property, which, it was thought, the common law, by " itself, might be too weak to effect. But the law of *personal* " *condition or obligation*, in so far as it did not require for its " binding power, to be converted and perfected into this full " measure of *real right*, remained as before. And, therefore, " though the statute was required to protect the estate as *against* " *onerous third parties*, the common law continued to possess

" sufficient natural force in itself, in all questions arising merely " *inter hæredes.*

" In this point of view, the matter is well explained by Lord " Kaimes, *Elucid.* p. 340;—' A man *may bind his heirs*, by pro- " ' hibiting them to alien, or contract debt; but he *cannot pro-* " ' *hibit one to purchase* from his heir, or to lend money to him, " ' because a purchaser or creditor is *not subjected to his authority.* " ' A penalty annexed to the prohibition, such as a forfeiture of the " ' heir's right, will affect him *(the heir)*; and upon a declarator " ' of irritancy will deprive *him* of the estate. And yet, as he " ' continues proprietor till a decree be pronounced in the declara- " ' tor, *his alienations must be effectual*, as well as *debts contracted* " ' by him.' And again (p. 346,)—' A *tenant in tail* is subjected, " ' *by his own consent*, to the prohibitive and irritant clauses; " ' he accepts of the estate *under these conditions. All others* are " ' subjected *by the statute*, discharging them to lend money to a " ' tenant in tail, or to purchase his land. Hence, no deed done " ' contrary to these prohibitions is available in law; with respect " ' to the *tenant in tail*, it is voidable *as a transgression of his* " ' *engagement*; and with respect both to him and to *the persons* " ' *he contracts with*, it is voidable *as a contempt of legal autho-* " ' *rity.*'

" If it were true, that nothing short of an entail, completed in " strict terms of the statute, could affect *heirs*, any more than it " does *creditors*, such a rule ought to operate universally, and " there could be no exceptions to it. But there are many.

" 1. A *separate obligation* binding the party not to grant " any deed whereby the destination might be affected, is ad- " mitted to be operative. Indeed, this is just the case of Ure " *v.* Crawford, the authority of which has been conceded upon " that very footing. But why should a separate obligation " avail more than an express prohibition inserted in the body of " the right? If the question were with an onerous third party, " the separate obligation would be just as inoperative as the other.

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" Indeed, it is all the weaker where the obligation is not to be " found *in gremio* of the investiture, because there is just so much " more room for the third party to plead *bona fides*,—if that were " otherwise relevant. The importance of Ure's case consists in " this, that what was mere matter of *personal obligement*, though " not good against third parties, was still good *against heirs*. " And if personal obligement be sufficient to protect a destination " not otherwise brought within the statute, the inevitable con- " clusion is, that *no more* has to be established in any case in " order to protect *inter hæredes* a defective entail.

" (2.) Take next the case of *destinations in marriage-contracts*. " And here it will be found instructive to mark the distinction, " which Erskine so emphatically explains, between settlements " ' so drawn as to give the heir a *proper right of fee* in the land " ' estate,' *Ersk.* iii. 8, 40; and those where ' the heir's right is " ' not a right of proper credit but *of succession*,' *Ibid.* sec. 39. " In the former, the father can execute no deed, whether onerous " or gratuitous, in defeasance of the child's right, and he may be " interpelled, by the ordinary diligence of the law at the child's " instance, in protection of his right. But in the latter, the child " being not in the strict sense a creditor, but only an heir of pro- " vision, ' cannot come in competition with the father's *onerous* " ' *creditors*,' and cannot use *inhibition* or other *diligence*, so as to " enforce his own rights, or disturb the father's powers of admin- " istration, and is in short, in every point of view, substantially " in the same position as that wherein a substitute heir of entail " stands, in a question *inter hæredes*, with reference to the rights " of the heir in possession. Now here, independently of the Act " 1685, it is undoubted law, that the marriage-contract, though " wholly unavailing against onerous creditors, or against a dis- " ponee for onerous causes,—is yet effectual to ' restrain the father " ' from *gratuitous deeds* to the prejudice of the heir of the mar- " ' riage.' And why is this, but that imperfect in some respects " as the obligation of the father is, it still infers an *obligation*, in

" which the heir stands, '*quodammodo* creditor to his father,' " *Ibid.*, sec. 38; and doing so, is entitled to protection against " every deed which the father may execute, where such protection " does not happen to be *excluded*, by the preferable and stronger " right, which, notwithstanding the obligation *intra familiam*, " may belong to an onerous third party.

" It has been observed, that a marriage-contract is a contract " *uberrimæ fidei*, and entitled to the most liberal interpretation; " whereas an entail is *strictissimi juris*, and all construction by " implication excluded. Now, no doubt this would be a good " answer, wherever it requires any argument on implication, or " any strained construction of the deed, to establish the *existence* " *of the obligation* supposed to have been laid on the heir of entail. " But, on the contrary assumption, that the obligation is in itself " clear and express, requiring neither presumption nor inference, " nor implication, to make it out, the answer has no force. The " question is, what is to be the effect of the *obligation*—as an " obligation clearly and confessedly imposed? Is it not to be " good *inter hæredes*, if the deed declares the heirs to be bound? " Or, however expressly so declared, is it to be bad even *inter* " *hæredes*, simply because not fortified and converted into a real " *quality* or *condition* of the right by attending to the statutable " requisites of the Statute 1685?

" (3.) Take another case. If it be enough to deprive an entail " of all efficacy, that the statute has not been followed out, how " comes it that an entail which has *never yet been feudalized* is " notwithstanding good, not against heirs merely, but even " against *creditors?* Yet, unless where the heir is *alioquin suc-* " *cessurus*, so as to afford him a separate title of possession through " which creditors can attach the estate under his apparency, it is " undoubted law, that so long as the entail rests upon mere " *personal title* its conditions will be effectual against all and " sundry. In such a case, neither creditors nor purchasers, any " more than heirs, 'could object to their being barred by every

" ' clause in the tailzie, as if it had been recorded in the Register
" ' of Tailzies, and as if their debtors had been infeft, and the
" ' irritant clauses insert in their infeftment; as was adjudged by
" ' the House of Peers in the question between Mr. James Baillie
" ' and Mr. Archibald Stewart, *alias* Denham of Westshiells.'
" —*Kilk.*, 546, and see Westshiell's case in *Dom. Proc.*, 1 *Craigie*
" & *Stewart*, 113. Russell, Jan. 31, 1792. Bell's *Cases*, 166,
" &c., &c.

" It is impossible to conceive a case more wholly out of the
" protection of the Act 1685 than the one here put. And the
" inference necessarily is, that there may be *obligation* legally
" enforceable, independently of that statute. The statute to be
" sure, is indispensable, in order to give the full efficacy of a *real*
" *right* to the conditions of the entail. But wherever there is a
" party against whom the mere existence of *personal obligation*
" is, *per se*, sufficient, it is not necessary to go farther. In this
" very question, *if the deed of entail had stood unfeudalized*, the
" conditions imposed by it would, upon the authorities referred
" to, have been, without any aid from the statute, a good answer,
" *even to creditors. A fortiori*, then, must this be the case in a
" question *inter hæredes*. And if the *unfeudalized* deed would
" have been sufficient for this purpose,—although, *after feudali-*
" *zation*, any mere *personal conditions* would no longer be of
" efficacy in a question with *creditors or purchasers*, because such
" parties, whether under the statute or at common law, *when*
" *dealing with a proprietor infeft*, can only be affected by what
" amounts to *real right*,—surely, in a question with *heirs*, who,
" as regards the operation of *real right*, stand in a totally different
" predicament, feudalization could never weaken, much less
" undo the binding force of the previous *obligation*.

" (4.) An entail regularly feudalized, but *not recorded* in the
" Register of Entails, affords another example where, though in
" respect of the statute unavailing against creditors, the condi-
" tions of the entail, as inferring personal obligation, are still

" effectual in a question with heirs. This, however, has been " already noticed in Lord Fullerton's opinion; and reference " may only further be made to Hall, Feb. 1726, *D.* 15,373; and " M'Gill, June 13, 1798, *D.* 15,451.

" (5.) Other illustrations might be drawn, from the effect of " a *partial* burdening or sale of the lands, where, (as is well " known,) although, from defect in the irritant clause or other- " wise, the real debt or sale itself may stand good to the *onerous* " *third party*,—the very success of the act of contravention " affords ground, *as against the offending heir*, for the forfeiture of " *all that remains of the estate*, under the unaided operation of " the prohibitory and resolutive clauses.

" But it is needless to enlarge. The sum of the whole " matter comes to this, that it is not requisite in the case of " *entails*, any more than in the case of other *conditional* grants " and conveyances, that the conditions of the right should extend " beyond the mere matter of *personal obligation* in order to their " being binding and operative, in a question with the *grantee* " *and his heirs*. No doubt, where the conditions of the entail " are not perfected into matter of strict *real right*, the existence " of mere personal obligation will not secure them from being " defeated, as in a question with *onerous third parties*. But this " is not peculiar to the case of entails. For, in no case whatever, " unless where the proprietor's own right happens to be still " *unfeudalized*, (in which case *assignatus utitur jure auctoris*,) " is the real estate or its investiture held to be affected by " any mere obligation personally incumbent on the individual. " Hence, indeed, the whole doctrine of *real rights*, as rested in " the ordinary case on infeftment and registration. The only " difference in the case of entails is, that in order to complete the " *real right* peculiar to that category (where this is necessary), " there must, in addition to infeftment and registration, be inter- " poned the solemnities also of the Statute 1685.

" Upon the whole, therefore, while I am quite prepared to

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" recognize the authority and perfect soundness of the decision " in the case of Ascog, and others of the like class, I am very " clearly of opinion that there is nothing in that decision to rule " the present question. In the case of Ascog, there was *no* " *personal obligation to do that which was asked of the heir.* The " deed did not order *reinvestment*, and the House of Lords very " properly refused to construe such an order out of its other " terms by *implication.* No doubt there was a *prohibition* to " sell. But a sale had been effected, and, in consequence of " the indefeasible right thereby conferred upon the *onerous third* " *party*, not by virtue of any inherent legal right *in the heir* " who had sold, this sale was in law good and effectual. The " estate, therefore, which the maker of the entail had meant to " entail was gone and irrecoverable; and the primary intent being " thus defeated, there was nothing on which to build anything " else. If the deed, however, had contained a positive and " express condition, (leaving nothing whatever to implication,) " that in case of the entail proving anywise defective, the heir of " entail should be bound and compellable to do *all that was* " *necessary to cure this defect*, and,—in case of the original estate " having, in the meanwhile, been carried off,—to *reinvest* the " price, or a certain specified amount of money in its stead, in " the purchase of other lands to be settled on the same heirs, in " terms of strict entail, *wherein the flaw of the original deed* " *should be cured*,—so as to exclude the indefinite recurrence of " alternate sales and reinvestments without end,—there is " nothing, so far as I am aware, in the case of Ascog, to estab- " lish that this, as matter of *personal obligation*, and in a pure " question *inter hæredes*, would not have been available,—and if " available *inter hæredes*, it must of course have been equally so " against parties deriving *gratuitously* through them. Accord- " ingly, having no doubt that, in such a case, the obligation,— " to reinvest, and of new to entail, in strict conformity with the " Statute 1685,—would have been a perfectly good obligation,

" and capable of available enforcement *inter hæredes* in a court of " law, I am humbly of opinion that in the present case, the " gratuitous deed, whereby, in face of an *express prohibition* to " alter the order of succession, that order of succession is at- " tempted to be altered (the estate originally entailed all the " while remaining with the granter), cannot be supported.

" J. IVORY."

" The Judgments pronounced in the House of Lords in " the cases of Ascog, Bruce, and the Marquis of Queensberry, " rest on one ground at least, to which no answer was made at " the time when the case was decided, and has never been con- " troverted since, that, where an estate, held under an imperfect " entail, has been sold, the Court cannot, by finding damages or " otherwise, make new entails, which the entailer never con- " templated, and of estates which he never had, and that as often " as the heir in possession may choose to sell them. That has " no bearing on the case where the estate remains, and where " the question is, whether a conveyance, made by a *mortis causa* " deed entirely gratuitous, has the same effect as a sale to a third " party. The argument of Lord Fullerton, confirmed by the " opinions of Lords Moncreiff, Jeffrey, and Ivory, expresses fully " and clearly what I have always considered to be the law " applicable to such cases. Lord Cuninghame has referred to " the law of prescription as applicable to fee-simple and limited " titles. The decisions which have established and regulated " that doctrine could not have been pronounced unless entails " had been held to be valid *inter hæredes*, which were not " effectual against creditors under the Statute 1685. I know " that Sir Ilay Campbell, and other great lawyers, attached the " greatest importance to those decisions, which show that this " distinction between entails valid under the statute, and those " which constitute an obligation *inter hæredes* only, is not one " which rests on insulated decisions or authorities, but is inter-

" woven with what has been long recognized to be the law of " Scotland.

" JOHN A. MURRAY."

The cause was set down for hearing upon these opinions, and was again fully argued, as well on the construction of the entail as on its efficacy in questions *inter hæredes*, by *The Lord Advocate* and *Mr. Anderson* for the appellants, and *Mr. Kelly* and *Mr. G. G. Bell* for the respondents, but every argument and authority used on either side, was anticipated in the voluminous opinions delivered by the Judges below.

LORD BROUGHAM.—Thomas Carrick, possessing the estate of Burnhead under an entail, as is contended, executed by Robert Carrick, of Braco, disponed the estate by an instrument dated October 22, 1835, to himself and his heirs, and assigns whatsoever. Upon this disposition, which was found in his repositories after his decease, evidently a *mortis causa* deed, the appellants, his sisters, and heirs at law, were served heirs portioners, that is, heirs at law to him, and took infeftment upon that service, in virtue of the disposition which he had so executed.

But the respondent brought an action of reduction of this disposition and this sasine, as next heir of entail, under the settlement executed by Robert Carrick, of Braco, on the 18th of July, 1820, and recorded on the 20th of November, 1828, contending that Thomas Carrick, the disponer, possessed the estate under the tailzie so executed, and that it was fenced with proper clauses, prohibitory, irritant, and resolutive, to prevent his altering the order of succession. This action, therefore, brought in question the validity of the tailzie.

It was determined by the Lord Ordinary, and afterwards by the Lords of the First Division, that the disposition was effectually struck at by the entail, and therefore must, with the service which had followed upon it, be reduced. An appeal

being prosecuted from these interlocutors, your Lordships, on the 30th of May, 1842, after hearing the case argued, remitted it to the Court of Session, with directions to consider, whether upon the supposition, not deciding it one way or the other, that the irritant clause should be held defective, as directed against the institute, the tailzie was or was not still sufficiently effectual to prohibit and prevent the granting the disposition as a gratuitous deed, and to consult the Lords of the Second Division, and the permanent Lords Ordinary.

In obedience to this remit, their Lordships of the First Division, having consulted those of the Second and the permanent Lords Ordinary, reported the opinion of the whole Court to this House, in answer to the question by your Lordships submitted to them. This answer is in the affirmative, by all the learned Judges except one, the Lord Justice Clerk alone considering the entail as insufficient to prohibit a gratuitous deed altering the order of succession, on the supposition of the irritant clause itself being invalid and insufficient.

The whole question now comes before us, and it is very material in the first place to observe that no opinion whatever was given, and none was formed by this House, upon the preliminary question whether or not the irritant clause is valid.

[LORD CHANCELLOR.—Nor was any opinion intended to be expressed.]

LORD BROUGHAM.—Clearly not. We thought it inconvenient to consider a point on which no opinion had as yet been given by the Court below, and which being decided one way, might make it quite immaterial to discuss the question of the irritant clause being valid or not, namely, what would be the effect of the entail upon the deed under reduction, supposing the irritant clause to be held insufficient. But no opinion was here pronounced, either by the House generally, nor any final and conclusive opinion by any one of its members, I take upon me to say from the most distinct recollection, upon that preliminary

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point touching the validity of the irritant clause. The Lord Chancellor gave an indication of the inclination of his opinion upon this point, but his Lordship (and that is material,) guarded himself and the House upon the subject by these express words, which he used after he had said what he inclined to. "It is not "to be considered that we have decided any further than direct- "ing the remit." That was expressly with a view to exclude the supposition of any decision having been pronounced. Two points then remain for decision. First, Is the irritant clause effectual against the institute Thomas, the disponer, called erroneously in the deed of entail *George* Carrick? Secondly, (a question which only arises in the event of our holding the irritant clause ineffectual,) Is the prohibition in the entail, which past all doubt is levelled against the institute, sufficient to prevent a gratuitous deed altering the order of succession? a deed too in this case not delivered, but plainly *mortis causa*.

Now this second point is really very important, and it is material therefore that there should be no doubt left upon it; and I am rather surprised, and a little grieved, that there should have been any doubt thrown upon it by so high an authority as the Lord Justice Clerk, for my opinion is perfectly clear and decided with the rest of the Judges. As Lord Thurlow once said, in a similar case, there is not even a probable argument upon the subject—there is not even a point on which to hang an argument —and it is very important to the entail law of Scotland that there should be no doubt left upon the point when none exists.

First there appears, when the whole structure of the tailzie is closely considered, no ground for denying that the irritancy strikes at the acts of the institute. I certainly at first had a doubt and partook of the inclination of opinion which has been expressed; but upon closely considering it, I think there appears to be no reasonable ground for denying that the irritancy strikes at the acts of the institute. There may be some obscurity occasioned by the needless repetition with which the clause abounds,

the redundancies mentioned in the Lord Ordinary's interlocutor, but still the institute is sufficiently struck at.

It is to be observed, as a sure foundation whereupon to build, that the prohibition plainly affects the disponee, the institute, in the most precise terms, viz., by naming him. This is very material, on account of the reference afterwards made, in terms equally express, to that preceding part of the instrument. Not only is he by name prohibited from "contracting debts or granting "deeds," "whereby the lands and estate may be evicted or the "said *lands and estate* and *the heirs of tailzie succeeding thereto*, "*may be anywise affected*," and not only are *all such deeds so granted* declared null and void, both as affecting the estate and the heirs of tailzie, but there is an express prohibition against the institute, by name "George Carrick," which should be "Thomas Carrick," altering the order of succession; and then in case the prohibition of the granting of deeds and the irritancy following upon it should be held insufficient, from the nature of the essential word "affect," to prevent altering the order of succession, another word immediately follows, upon which the main question here is raised. It begins as a resolutive clause, declaring that if the institute, by name George Carrick, or any heirs of tailzie, or heirs whatsoever, shall fail to observe any one of the aforesaid provisions, or "shall act *contrary to the prohibitions, or* "*any of them*," all of which were levelled at George Carrick, "then the contravener, either by failure, or acting contrary, shall "forfeit and lose, and the estate go to the next heir, as if the "contravener were dead." And then it proceeds to declare further, that upon every such contravention, failure or neglect, not only the "estate shall not be burthened or be liable to the "debts and deeds of the several heirs of tailzie, and heirs what-"soever, as before provided." Now, on this, much doubt would have arisen had the declaration stopped here, because mention is only made of debts and deeds of heirs of tailzie, and it might have been said that these are not debts and deeds of the institute, who

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is not an heir of tailzie; but the declaration goes on, and in terms expressly shows that it goes further, for it having begun with "not only," just as happened in the last case of Adam *v.* Farquharson, it now adds "but also," that is, "but in addition," "but "still further," and what is it that is thus added? "But also "all debts, deeds, and acts contracted, granted, or done," (that is, *reddendo singulos singulis*, debts contracted, deeds granted, or acts done,) "contrary to *these conditions and restrictions*, or to the "true intent and meaning of these presents, shall be of no force, "strength, or effect, and shall be ineffectual and unavailable."

Now, this being as general an irritancy as can be imagined of all acts done, and deeds granted, contrary to the preceding prohibition, and that preceding prohibition having been levelled at the institute by his name of George Carrick, this irritancy must be considered as an irritancy of the acts and deeds of contravention done or granted, the acts done or deeds granted by the institute George Carrick.

But then it is said, and this really is the sum of the appellant's objection, the words which follow declaring the other heirs of tailzie not to be affected, are sufficient to restrict the first-mentioned words to contraventions of the substitutes, because the institute not being an heir of tailzie, could not be referred to by the contradistinguishing word "other," because when we say "the institute and the other heirs of tailzie," it is said, if it is doubtful what you have done before, the word "other" shows it not to apply to the institute, but to the heirs of tailzie. But this will not do; for first, besides declaring that the other heirs of tailzie shall not be affected, the clause declares substantively that the contravening acts and deeds shall be of no *force*, *strength*, or *effect*—not, of no force as against the estate, not, of no force as against the heirs, but absolutely of no force, strength, or effect; and what follows, being wholly needless, a sufficient irritancy having been declared by these words now last cited, may be rejected as surplusage.

Secondly, if any clause, be it in a deed or in an enactment of a statute, sufficiently declares the intention of the Legislature or the maker of the deed, it is always a very dangerous mode of construction to allow that intention to be excepted from, or explained away by the use of such words as "other," and to raise up provisions from such terms. We very often find the word "other" not used in a logical sense. I will give an instance in a Scotch Act of Parliament, in which there are words to this effect:—"The person who commits the awful and abominable "sin of heresy contraire to the laws of God and all other human "laws." Now, the argument here would be, that that shows that the laws of God are human laws, just as it is said that "other heirs of tailzie" shows that the institute before named is an heir of tailzie, and not an institute; but it only means all other laws, to wit human laws. Thirdly, the clause goes on to declare, that the succeeding heirs shall, as well as the lands, be free *therefrom*, that is, from the deeds and acts of contravention, as if the same, repeating the extensive words "debts, deeds, or "acts," had never been contracted, granted, or done.

The introduction of this word "other," the pivot on which the argument against the entail turns, was probably owing to this, that no contravention could possibly affect the institute so as to require a saving of his rights. Any substitute contravening could only affect other substitutes, and the substitute contravening could, of course, not affect his own right, except by way of forfeiture; there was nothing therefore to guard him against.

It is unnecessary to examine the cases to which reference has been made in the course of this argument. The affirmance of the judgment below upon this first point does not in the least degree tend to impeach any one of the cases now held to be law, and to govern the jurisprudence of Scotland respecting entails, nor is it a deviation from any of them. How vain, for example, is it to contend, that there is any possible resemblance between this case and Lang *v.* Lang, which was very much argued upon!

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Counsel are constantly bringing up Lang *v.* Lang; and I really must say, once for all, that Lang *v.* Lang means no such thing as is contended for,—it depends upon the peculiar words and frame of the deed in that case, and nothing else. If the institute had in that entail been first prohibited to dispone, and then all such dispositions had been declared null and of no strength, force, or effect, and it had been added that they should not affect any *other* heir of tailzie, can any one doubt that the entail must have stood? The inaccurate use of "*other*" would never have converted the institute into an heir of tailzie, nor would it have prevented the irritancy following upon the prohibition, and connected with that prohibition by express words of reference from effectually irritating his acts and deeds. The argument is really conducted here as if the institute were sought to be brought under the prohibition by the use of the word *other*. In the Duntreath case, he was so brought in, that is, he was held below to be struck at by a clause levelled at heirs of tailzie. Is that, or any thing like that, the case here? It might be admitted, that if the preceding portion of the clause left it quite doubtful whether the acts of the institute were irritated or not, the use of the word *other* might shew heirs of tailzie, and not the institute, to be meant. But that is not the case. The prohibition is clear and not dubious; the institute by name is forbidden to alter the order of succession. Then he is forbidden by name to grant any deeds whereby the lands entailed may be any wise *affected*, or whereby the succeeding heirs of tailzie may be any wise affected; and all *such deeds* affecting either land or heirs, are positively declared to be null. This may possibly be thought to leave some doubt, arising from the word *affect*. But then follows the clause, that "*not only* the debts and deeds of the several heirs of tailzie "contravening shall not burthen the lands, *but also*," that is, but furthermore, "all deeds and acts granted and done in contraven- "tion, shall be null and *void*," without saying by whom done, that is, *all* contraventions whatsoever, and by whomsoever, and

this after an introduction in which the institute is named, and his possible contravention is supposed. "If George Carrick, or "any of the heirs of tailzie, shall contravene any of the pro- "hibitions herein contained, or shall act contrary thereto, then, "and in any such case, the contravener shall forfeit, and upon "every *such* contravention." That is, whether by George Carrick or by the substitutes, not only the lands and heirs shall not be affected by deeds of heirs of tailzie, *but also* all deeds and acts of contravention shall be null and void. Here, then, is a complete prohibition and irritancy levelled at the institute, and nothing doubtful is left which the subsequent words might be wanted to explain; consequently those subsequent words shall not be suffered, under colour of explaining what is ambiguous, to revoke or alter what is plain.

It therefore appears, that the irritancy being validly framed, the judgment appealed from must be supported; and it becomes unnecessary to deal with the other point, the second question before us—whether or not, if the irritancy were ineffectual, the prohibition is of itself sufficient to prevent a gratuitous deed? But as we have directed the Court below to deal with this point, and as its decision may affect, and indeed does affect other cases, we may as well dispose of it also.

It seems to be a position removed from all reasonable doubt, that an entail, though not sufficiently fenced by irritant and resolutive clauses, and by registration in the Record of Tailzies, may, nevertheless, if it contain a prohibition against altering the order of succession, protect the estate from being carried away by a gratuitous deed from the heirs of entail, called to the succession one after another. It is to be observed in the outset, and with reference to the question alone now before us, the effect of the Braco entail on the deed of disposition of the institute, disponing the lands to himself in fee simple, that this is not in any sense a gratuitous deed of alienation; it is no alienation at all, but a deed, the only object of which was to carry the estate after

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his death away from the substitutes to his own heirs at law, who were not heirs of tailzie at all. It was a *mortis causa* deed, simply to alter the order of succession.

It appears very difficult to read the Act of 1685, and not be persuaded that it applied much rather to the rights of third parties, of parties who had given a consideration for the title given by the heir of entail, than to volunteers. The frame of the enactment seems not only consistent with this supposition, but to support it. The king's subjects are told that they may now tailzie their lands, and affect them with such clauses as shall be good against all singular successors. But further, the condition annexed is of a most peculiar application to the rights of such parties, third parties, because it is, that the whole instrument shall be recorded in a particular register created for the purpose. Why? For what purpose? To give all parties warning, that they deal at their peril with a person possessing lands under an entail. The clauses, too, must be inserted as often as any step is taken in the title; they must be made public in the Register of Sasines each time any one of the series of heirs of provision succeeds to the preceding heir of tailzie.

It is quite impossible to regard an Act so framed as abrogating the common law right which fee simple proprietors of estates had to prescribe the order of succession in which their lands should go, as far as regarded the rights and objects of the heirs successively taking under their settlements. This Act is clearly not a restraining Act, but an enabling Act. It goes to enlarge, not to restrict, the right of irritancy. It had even been held in one case, I mean the Stormont case, about twenty years before the Act, that such fencing clauses would avail against purchasers at common law; and the authority of Sir Thomas Hope may be cited in favour of that doctrine prior to the Stormont case. But the sounder opinion was the other way, and the higher authority of Sir George Mackenzie (higher, because he is believed to have framed the Entail Act of 1685) may be appealed to for the

position that a statutory provision was held necessary for this purpose. But he most expressly says, that a simple prohibition was sufficient before the statute to prevent gratuitous deeds. Lord Kaimes distinctly takes this view of the subject in his *Elucidations*. The heir of entail (whom he not very correctly calls, tenant in tail) is, according to his Lordship, tied up by his own consent; purchasers are bound by the statute—"A man,' he says, "may bind his heirs, but he cannot bind purchasers." That is to say, an Act is required for that purpose. The same doctrine is laid down by Erskine and other institutional writers. Indeed, the effect of an unrecorded tailzie and its validity *inter hæredes*, is not to be understood upon any other view except the statutory requisites being intended to extend, and not to restrain the power, or supersede the common law right.

The authorities are all the same way. It may suffice to mention the case of Logan *v.* Drummond, which Lord Monboddo, who reports it, says turned wholly on the question whether the deed was onerous or gratuitous,—the prohibitory clause having sufficiently struck at gratuitous deeds, as was admitted on all hands, but especially the case of Grant *v.* Dunbar, in which an attempt having first been made to obtain reimbursement of the purchase money, on the ground of the sale being onerous, the party relied on its being gratuitous, and so void without any irritant clause. The Court held such deed to be clearly void.

But it is said that the decision of this House in the Hoddam case affirmed the principle of gratuitous deeds being valid, if only prohibited without any irritant or resolutive clause. I gave that decision, and therefore I think I know what the meaning of it was. I am astonished to see the Lord Justice Clerk citing that case: it has no application whatever to this; he might just as well cite Shelley's case. The point never was in any way before us; the question never was raised at all, either at the Bar or by the Bench; and surely no one who, with ordinary calmness and

candour, reads that judgment, can imagine, that upon a point so important, a point on which groes at a weight of authority lay the other way, I or this House would ever have given a judgment, disposing of that point one way without a word of argument, because there was not a word said about it. What we are supposed to have done is to have overruled a principle of law, upon which all the authorities agree, and all the cases, except the Ascog case, which I am coming to presently, and that only inferentially by way of suggestion, when not a word was said about it; for it is not mentioned except in the judgment,—it is not mentioned in the argument. The fact is,—and this has been more than once stated in this place,—that the judgment was drawn up in terms of the conclusions of the libel; it was a declarator brought by the heir of entail in possession, to have his right ascertained, and he had inserted in his libel a claim to alienate for gratuitous as well as onerous causes; and the Court was called upon to declare, that notwithstanding the fencing clause he had that right: now the fencing clause was insufficient; no doubt it was merely prohibitory. The Court below had found the fencing clause sufficient, consequently they made no question respecting the force of a mere prohibition—it did not arise. Your Lordships reversed the decision, and the conclusions of the summons were, *per incuriam*, no doubt inserted in the judgment. Now, how far this mistake might operate on the question of *res judicata*, subsequently, should the validity of a gratuitous deed come in question, it is needless, or, at all events, it is premature to consider. The statement of the fact when the case is used as an authority, as it is here, coupled with the terms of the argument in delivering the judgment, is quite sufficient to shew that the words inserted give no sanction whatever to the doctrine now maintained by the appellant.

It seems very certain, that were it not for the judgment of this House in 1830 upon the Ascog and Tillicoultry cases, we should have heard little of the argument now maintained for the

appellant; and the only one of the learned Judges who differed from the opinion given by his learned brethren on the remit in the first case, seems to have rested his argument entirely upon what fell from Lord Eldon in disposing of those cases concurrently with the Lord Chancellor. But first of all it is to be observed, that Lord Eldon felt all the difficulty of holding the proposition, that the right of entailing is purely a creature of the statute. He expressly said, that no one could hold this doctrine who considered what happened in the Stormont and other cases twenty years before the statute; and that is totally overlooked by those who cite his authority in this case; and he intimated that he felt extreme difficulty in holding simple prohibitions invalid in questions *inter hæredes*. Then what was the nature of the case before the House, and what the judgment below which was here reviewed and argued, and which was reversed? I mean in the Ascog case. It was no claim to have it found and declared, that a gratuitous alienation is void *inter hæredes*: it was a claim by the heirs of entail under an instrument, not fenced by the clauses irritant and resolutive, not to have it declared that a sale had been void, for a sale for value had been effected, and could not be invalidated; but to have the seller compelled to reinvest or retain the purchase money which he had received. The argument against that, and against the decision which prevailed, (and I think fairly prevailed here, though I doubted it at the time, as Counsel are very apt to doubt when a decision goes against them,) was, that neither the statute nor any provision of the entail, gave this right to the heir who had been damnified by the alienation; and besides, the ground mainly insisted upon was, that the heir of entail had a right to sell, that is to say, that his sale could in no way be set aside, for the entail was not fenced by the irritant and resolutive clauses; therefore he had a right to sell, and no means existed of calling him to account for doing what could not be undone, and could not have been prevented by any previous step. It was said you could not

have gone to the Court to obtain an interdict to prevent him. What he has done cannot be undone, and therefore you have no right to call upon him to reinvest the purchase money, which he has obtained by a due and legal act of sale. No one can read Lord Eldon's argument, and believe that he would have held the same opinion against the subsequent heirs of entail, had the entailer, besides forbidding the sale, provided that the price obtained by the contravener should be reinvested to the uses of the settlement; but it was because there was no such direction. An entailer might have said, "You shall not sell; but if you do "you shall invest the price:" just as he every day says, "You "shall not sell; but if you do, you shall forfeit to the next heir "of tailzie." Lord Eldon repeatedly dwells on the entail having no such provision; and it may be stated as a fact, (I may state that from my own distinct recollection,) that they who argued for the respondents in support of the judgment below, felt throughout extremely hampered by the great difficulty of practically dealing with the *modus operandi*. They complained explicitly, no doubt, of the gross inconsistency of holding simple prohibitions to be binding on the heirs as among themselves, and yet giving each a right to alienate for a valuable consideration without being liable to invest the price. They assumed as quite clear, that gratuitous alienations were prohibited. The question here was not as to the validity of that prohibition *inter hæredes*, but the question was as to the consequence of an onerous alienation, not gratuitous; for there was nothing gratuitous in it, but an onerous alienation, which was not effectually prohibited for want of fencing clauses. The difference between the two, therefore, is great and substantial. The parties were found in the result to be remediless. But that case is not only not this, but the very reverse of it; for it was there an onerous, and not a gratuitous alienation.

In the Ascog case, the estate was gone by a sale which could neither have been prevented beforehand, nor rescinded after it

was made, and no provision had been made either by the law of the land, or of the entail for indemnifying the succeeding heirs. In the present case the question arises upon the validity of a gratuitous deed, which is questioned, which may be prevented if foreseen, which may be rescinded if accomplished. Consequently the difficulty exists not, which in the former case was found to be insuperable, and the known rule of law may very well take its course. The estate remains too in the hands of a gratuitous donee. There the estate was gone—it here remains in the hands of a gratuitous donee, a mere volunteer, who has taken without value, and who in truth represents universally the heir of entail, the contravener of the law of the entail under which he took his possession. All that this House did in the Ascog, Tillicoultry, and Queensberry cases, was to refuse taking a consequence by implication of the doctrine that gratuitous deeds are struck at by a simple prohibition. The pursuers there, the damnified heirs of entail, contended, and the Court below supported them in their contention, that the right to a reinvestment of the purchase money, and a settlement of it to the uses of the entail, followed as a consequence from the heirs of entail being bound by the simple prohibition without fencing clauses. It is plain that this was asking the Court to take a long, an arbitrary, and a novel step. It was calling upon the Court to make a law for the entail, or to devise a legal remedy for an injury, merely because a wrong had been done, and this House refused to take this novel step; and what Lord Eldon repeatedly pressed in the course of that argument (I recollect it as distinctly as if it were yesterday, for it was a case that excited great interest) was, "What means have you of working this? How is the "price to be reinvested? Is the party to be called upon every "time it is sold, to reinvest the money?" And so he went on hampering me at every step with questions, which I found could not easily be answered.

A fact stated by Lord Murray deserves much attention in

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disposing of this question: his very learned kinsman, the late President Sir J. Campbell, his Lordship says, and other great lawyers, held, that the cases decided respecting prescription, could not have been so determined, but for the assumption that the distinction is well grounded in law between entails valid by the statute, and entails only binding *inter hæredes* for want of the apt clauses. It is manifest that this opinion shews how intimately interwoven with the whole Scotch law of real property that important distinction is; therefore, both upon the ground of the irritant clause being validly directed against the institute, and upon the separate and independent ground of the simple prohibition being of itself sufficient to prevent any taker under the entail, whether institute or substitute, from gratuitously altering the order of succession, I move your Lordships that this Interlocutor be affirmed.

My Lords, I have one observation to make, and which shall be a very short one, respecting the printed papers in this case and the last. I see in one instance, particularly where the question is reduced to the narrowest compass as regards authorities, the learned persons who framed the papers go into the whole useless, superfluous, prolix statement of all the principles of the law of entail, from the Duntreath case, from the Tillicoultry case of 1799, downwards; and they enter upon page after page of print, to the great expense of their clients, or of those who have to pay. There is no doubt, that if they are appellants they will have to pay themselves; but if costs should be given against some of the respondents, those respondents would have to pay for it. They enter into these matters in the most useless way, because nobody doubts these principles of entail law now. We have been having them year after year for the last forty years. They are just as well known as that two and two make four. The parties ought to confine themselves to the point in the cause: and they very often miss the real point in the cause, by entering into a great number of other points that are not in the

cause, and never will be in any cause whatever. It makes it very difficult to read the cases.

LORD CAMPBELL.—My Lords, I will just say, that having heard this case argued, I entirely concur with my noble and learned friend who has addressed the House upon both points. With respect to the irritant clause, I think it is sufficient upon principles which I shall by and by state when we come to the Aboyne case. (Vide *supra*, p. 289.)

Upon the other point I have no doubt whatever, that by the law of Scotland a deed of entail, with prohibitory clauses, is binding *inter hæredes* without irritant and resolutive clauses. And I must say in this case, without meaning the smallest possible disrespect to the Lord Justice Clerk, that my concurrence with the other learned Judges is strengthened by having read his most elaborate and most learned argument on the other side; because that shews, that all that profound learning in the law of Scotland, extreme ingenuity, and unwearied industry can bring forward to shake that doctrine, has no effect whatever. It seems to me, my Lords, that the only plausible argument that can be urged against the doctrine arises from the Ascog and Tillicoultry cases. But the points in those cases and in the present are wholly dissimilar, because it may very well be that the heir of entail, after an alienation for value, may have no interest at all in having the proceeds reinvested to the same uses, no right to have them reinvested, and no legal remedy to enforce any such right, and yet that if there be an entail with prohibitory clauses, *inter hæredes* the deed shall be binding. The Tillicoultry and Ascog cases I had the honour to argue. I was on the winning side. I had a very strong opinion indeed in favour of the doctrine that I had to contend for, which was so strong, that even my noble and learned friend, I believe, felt at the time, or at least, he now feels, that it was utterly impossible that he should prevail. But we have here an entirely different entail.

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I think that, before the statute, by the law of Scotland, such a destination was binding *inter hæredes*, and that there is no pretence for saying, that that statute has at all altered the power which before existed.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the Interlocutors, so far as therein complained of, be affirmed with costs.

DEANS, DUNLOP, and HOPE—RICHARDSON and CONNELL, Agents.

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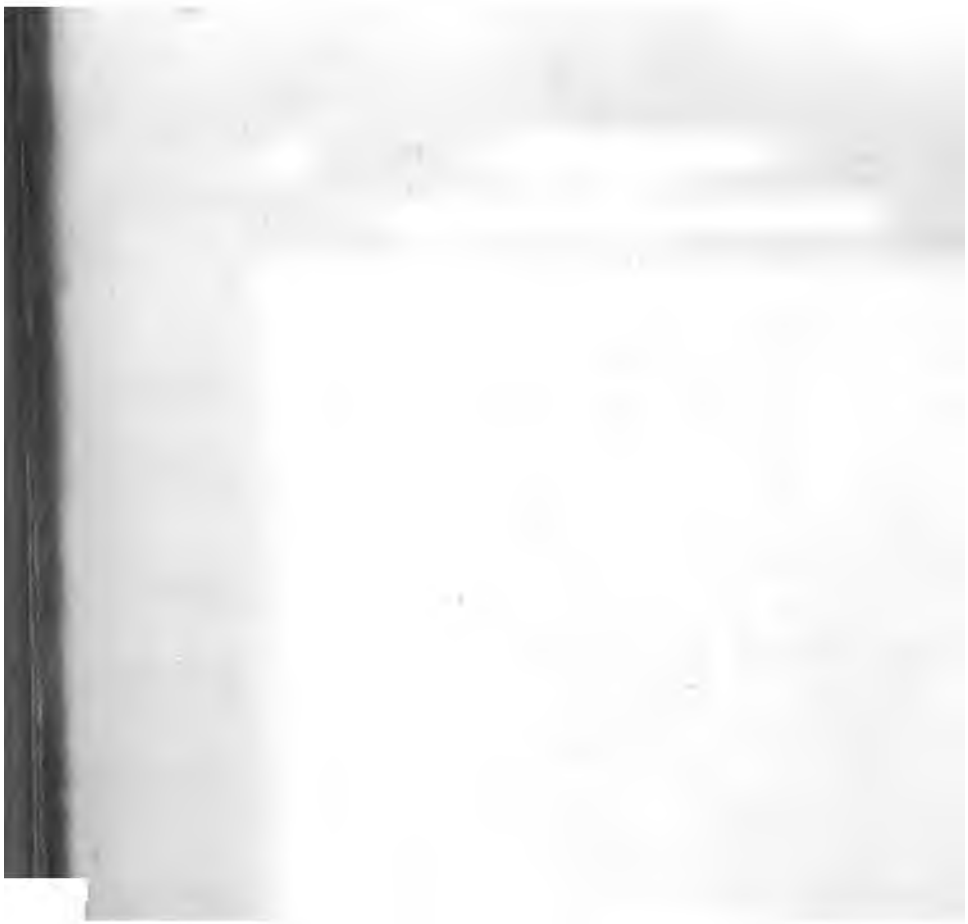
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